

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC.

vs.

LAWSON SOFTWARE, INC.

:
: Civil Action No.
: 3:09CV620
:
:
: September 27, 2010
:

COMPLETE TRANSCRIPT OF THE FINAL PRETRIAL CONFERENCE
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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P R O C E E D I N G S

THE CLERK: Civil action number 3:09CV00620, ePlus, Incorporated versus Lawson Software, Incorporated. Mr. Scott L. Robertson, Mr. Craig T. Merritt, Jennifer A. Albert, and Mr. Michael Strapp represent the plaintiff. Mr. Daniel W. McDonald, Mr. Robert Angle, Mr. Dabney J. Carr, IV, and Ms. Kristen Stoll-DeBell represent the defendant. Are counsel ready to proceed?

MR. ROBERTSON: Yes, Your Honor.

MR. McDONALD: Your Honor, I'm not sure if Mr. Schultz was mentioned. He's a new person on our team here that hasn't been in court. May I introduce Mr. Schultz of Merchant and Gould.

THE COURT: Sure. Glad to have you. I started practicing law in 1967. 18 years ago I took this job. I've been through a lot of cases and a lot of litigation. I've never seen anything like this. It is the most remarkable exercise of a lack of discipline that I have seen ever in my whole time on the bench.

How many exhibits does the plaintiff have?

MR. ROBERTSON: We have a little over 300, Your Honor.

THE COURT: 100. That's all you get. You're through. I told you. Where do you think you can do this?

1 Where do you get by with this kind of stuff? How many do you
2 have?

3 MS. STOLL-DeBELL: We have 89, Your Honor. 76 are
4 stipulated.

5 THE COURT: 89. Is that not enough? Why do you need
6 300 exhibits to do anything with?

7 MR. ROBERTSON: We are the plaintiff, Your Honor. We
8 do have the burden of proof, and there's a lot of documentation
9 necessary to the infringement case.

10 THE COURT: I've never seen an infringement case that
11 takes documents of that volume ever. I'm going to start taking
12 a look at them, and you're going to probably end up having it
13 just curtailed to some arbitrary number because you can't
14 control yourself.

15 Get the first volumes of books and put them up here,
16 please. You all come up here and do it so Mr. Neal doesn't
17 have to do it.

18 THE CLERK: I don't mind.

19 THE COURT: Give me the first in order, a number of
20 them that can fit here.

21 MR. ROBERTSON: Your Honor, if I can make a
22 suggestion for the convenience of the Court, and that is, Mr.
23 McDonald and I have talked about this, at your suggestion at
24 the last hearing, perhaps grouping some of these exhibits
25 together that make logical sense that pertain to certain

1 issues. That way we wouldn't have to repeat a lot of the
2 arguments, and we can deal with the exhibits that are similar
3 kind, and I prepared a document that addresses those groupings.

4 THE COURT: Let me have it, please. Thank you.

5 MR. ROBERTSON: Can I make one more request, Your
6 Honor, if possible? Since we got a lot of these exhibits right
7 here, would it be possible to work from the bench here as we
8 address some of these issues as you raise?

9 We'll be spinning around a lot, and I've split some
10 of the issues with my colleagues, and I just don't want to have
11 a musical chair kind of event going on here as we go back and
12 forth.

13 THE COURT: The only reason I'm in here is because I
14 don't have any room anywhere else to put it. We usually have
15 these in the conference room. You don't need to stand up. You
16 need to speak up when you are talking. You can turn around, do
17 what you need to do.

18 I guess I need the rest of these up here if you're
19 going to do it this way. 13 volumes of exhibits.

20 MR. CARR: Your Honor, do you want the plaintiff's
21 exhibits?

22 THE COURT: Yes, just the plaintiff's. That's all
23 I'm taking.

24 MR. CARR: There are several very large exhibits that
25 I don't think you will want up there, but these four boxes that

1 are there, those are the ones you probably want. There's six
2 exhibits that take up about ten boxes, and I think we can
3 probably talk about them without you actually having them up.

4 THE COURT: Thanks, Mr. Carr. We ought to be able to
5 get all 13 of them up here somewhere. Thank you very much.

6 Starting with the pretrial order, Roman numeral
7 III-A, are there any objections to any of these witnesses? Do
8 I have anything to deal with with Appendix 1 to the pretrial
9 order? None, all right.

10 Next is appendix -- I don't have -- okay, Appendix 2
11 is Lawson's witnesses. Any objection to any of these
12 witnesses? All right, none.

13 All right, we have ePlus's exhibits as to which there
14 are no objections and ePlus exhibits as to which Lawson objects
15 on the grounds stated therefor. In order to deal with that,
16 what you are saying is you suggest we go through groupings.
17 Group one is UNSPC white papers; is that right? What is a
18 UNSPC white paper? It's your objection. Speak up.

19 MS. STOLL-DeBELL: Your Honor, our objection is that
20 these --

21 THE COURT: Pull that thing a little closer to you
22 so the court reporter and I can hear. If you'd like to, you
23 can kind of move that screen off a little bit toward Mr.
24 Schultz -- there you go. All right. Now, what is a UNSPC
25 white paper?

1 MS. STOLL-DeBELL: These are three third-party
2 documents, Your Honor, relating to UNSPSC codes.

3 THE COURT: What is that?

4 MS. STOLL-DeBELL: It is a way of categorizing
5 products.

6 THE COURT: Who is UNSPC?

7 MS. STOLL-DeBELL: UNSPSC, it is -- I think it was
8 developed jointly by Dunn & Bradstreet and maybe the United
9 Nations, but it's --

10 THE COURT: Who did these documents come from? You
11 said it's a third party. Who generates them?

12 MS. STOLL-DeBELL: There are -- they were generated
13 by different parties. I think one is from the UNSPSC website,
14 and the others come from another third party. I can't recall
15 exactly who it is, but it's not any of the parties in this
16 suit. It's our position these documents are hearsay and that
17 they can't be authenticated.

18 THE COURT: And that what?

19 MS. STOLL-DeBELL: They cannot be authenticated. I
20 think the other two, Your Honor, PX-11 and PX-32, are from a
21 company called Granada Research.

22 THE COURT: Wait a minute. PX-11 is the first one
23 listed.

24 MS. STOLL-DeBELL: Yes.

25 THE COURT: There are three of them listed.

1 MS. STOLL-DeBELL: Yes.

2 THE COURT: 11, 31, and 32. So I'm going to pull 11
3 out here. United Nations Standard Products and Services Code.
4 The objection is that it's hearsay.

5 MS. STOLL-DeBELL: I do think they are all similar.
6 They relate to similar subject matter.

7 THE COURT: You think what?

8 MS. STOLL-DeBELL: They are all similar, all three of
9 those exhibits.

10 THE COURT: All right. Mr. Robertson?

11 MR. ROBERTSON: Yes, Your Honor.

12 THE COURT: Whoever is going to answer. If you're
13 not going -- make sure you give your name so the court reporter
14 knows who it is -- she'll have it down. You don't even have to
15 stand up if you don't want to. I just need to be able to hear,
16 she needs to be able to hear you.

17 MR. ROBERTSON: Thank you, Your Honor.

18 THE COURT: PX-11, I've got it right here. It's a
19 several-page document, and it says it's Standard Products and
20 Services Code.

21 MR. ROBERTSON: Yes, sir. As Your Honor may recall,
22 one of the claim elements at issue in the case is converting
23 means or the ability to convert from one product to another
24 product. What the UNSPSC is is a code that was created by the
25 United Nations and Dunn & Bradstreet in order to be able to

1 link together a hierarchy of similar types of products.

2 Lawson uses it in its software in order to be able to
3 make those kind of substitutions. Dr. Weaver has cited it in
4 his report both in the Ariba and in the SAP case. There is
5 Lawson documents who instruct --

6 THE COURT: You say Lawson uses this code?

7 MR. ROBERTSON: Yes, sir.

8 THE COURT: Where did this document come from?

9 MR. ROBERTSON: It came from the UNSPSC website. Dr.
10 Weaver obtained it. We've had it in the other cases.
11 Everybody does it this way, Your Honor. ePlus does it this
12 way, Ariba does it this way.

13 THE COURT: Does what this way?

14 MR. ROBERTSON: They employ this code to be able to
15 search for similar products. In fact, at page 11 of the
16 document, that is PX-11 at the bottom, it explains that the
17 UNSPSC is a hierarchal classification having five levels. The
18 levels allow users to search products more precisely because
19 searches will be confined to logical categories.

20 You can see on the next page, Your Honor, at page 12,
21 as you drill down over this hierarchy of ten separate numbers,
22 you get down to a level where you have a group of substitutable
23 products or services. There will be a Lawson video we'll be
24 discussing later, Your Honor, where a Lawson trainer instructs
25 users how to access the UNSPS website to download these codes

1 into their system.

2 So this is evidence of the infringing activity and
3 permits the jury to understand how this code is used to satisfy
4 certain of the claim elements.

5 THE COURT: How is it evidence of infringing
6 activity?

7 MR. ROBERTSON: Because when you link together the
8 evidence that shows the UNSPSC codes being used to identify
9 substitutable products and you hear Dr. Weaver's testimony how
10 this is employed, and then you'll also hear evidence from a
11 Lawson employee that they utilize this UNSPC code for doing it,
12 you put together evidence that shows they are satisfying this
13 critical element we need to establish to prove infringement.

14 THE COURT: Why didn't you get these documents from
15 Lawson?

16 MR. ROBERTSON: Lawson didn't produce them.

17 THE COURT: I thought you said they admitted using
18 them.

19 MR. ROBERTSON: They instruct their users to use
20 them. They didn't produce them to us, Your Honor. Dr. Weaver
21 obtained it from the UNSPSC website. We do believe that they
22 are not hearsay under Rule 803(17) as they are commercial
23 publications.

24 THE COURT: They are what?

25 MR. ROBERTSON: It's a commercial publication, Your

1 Honor, that's commonly relied upon in the industry. In fact, I
2 believe I have deposition testimony, if you give me a minute,
3 Your Honor.

4 THE COURT: You're going to have Dr. Weaver say that,
5 and you're going to have their customers say that, Lawson
6 customers say they rely on it?

7 MR. ROBERTSON: Here's Mr. Yuhasz, a customer from
8 Novant.

9 "Question: And you understand UNSPSC to be a
10 classification system for particular items?

11 Answer: Yes.

12 Okay. And does Lawson RFS system -- that's one of
13 the products -- that we're going to see today, does that have
14 the capability of using those UNSPSC codes?

15 Yes.

16 Question: Can I search using UNSPSC codes on the
17 Lawson requisition?

18 Answer: Yes.

19 Self-service system that we are going to see today.

20 Yes."

21 It goes on for several more pages, Your Honor, but I
22 think --

23 THE COURT: But did he identify these exhibits, 11,
24 31, 32?

25 MR. ROBERTSON: No, Weaver, Dr. Weaver identified

1 them.

2 THE COURT: I know he did, but when you asked this
3 man, this customer, did he also identify them?

4 MR. ROBERTSON: No, he did not, Your Honor, but the
5 fact is --

6 THE COURT: Why not?

7 MR. ROBERTSON: I don't know that he had the
8 documents, Your Honor. It wasn't produced pursuant to the
9 subpoena that we issued to Novant.

10 THE COURT: Does that mean you couldn't have asked
11 him about it when Dr. Weaver found it?

12 What's the basis of your lack of authentication if
13 Weaver can authenticate them? You don't have one, do you?

14 MS. STOLL-DeBELL: Right. But they are hearsay.
15 They haven't shown --

16 THE COURT: That's different than authentication.
17 I'm dealing with authentication. Authentication is overruled.

18 MS. STOLL-DeBELL: The deposition testimony that he
19 just read for you said that Lawson has the ability to use
20 UNSPSC codes.

21 THE COURT: He says 803(17) is the exception.

22 MS. STOLL-DeBELL: But for that exception to apply,
23 he needs to show that it is relied on generally by the public
24 or at least a relevant group.

25 THE COURT: I thought Weaver was going to say that.

1 I thought he just said Weaver is going to say that.

2 MS. STOLL-DeBELL: I don't think that Dr. Weaver has
3 the expertise to be able to say that. I think what's relevant
4 here is do Lawson's customers rely on this, does Lawson rely on
5 it, does ePlus rely on it, and we don't have that information,
6 Your Honor.

7 THE COURT: Who are you going to use to show
8 generally used and relied on by the public or by persons in
9 particular occupations? Who is going to say that?

10 MR. ROBERTSON: One of their witnesses, Your Honor.
11 There's a Plaintiff's Exhibit 112, which is a Lawson inventory
12 control user guide, which specifically references use of the
13 UNSPSC. There's also this Lawson training video where it's
14 instructing Lawson customers to download the UNSPSC codes from
15 the website. That's Plaintiff's Exhibit 404.

16 THE COURT: That shows that Lawson uses it. That
17 doesn't make it admissible under 803(17). You've got to show
18 it's generally used. Who's going to do that? She says Weaver
19 can't.

20 MR. ROBERTSON: Well, Weaver's seen it and
21 experienced it in both Ariba and SAP, and Mr. Farber, who is
22 the president of ePlus Systems, uses it in the ePlus system,
23 and he is familiar with the industry and understands that
24 everybody in the industry --

25 THE COURT: Then the short answer to that question

1 is, Mr. Farber is going to say that it's -- provide the
2 foundation for that; is that right?

3 MR. ROBERTSON: Yes, sir.

4 THE COURT: Okay, that's all you had to say.
5 Objection overruled for the hearsay with foundation. That
6 means you have to have foundation with it. 403, now, you
7 really have a 403 objection?

8 MS. STOLL-DeBELL: Yes, Your Honor. I think this is
9 cumulative evidence. To the extent that Lawson uses the UNSPSC
10 codes, it's talked about in our manual. We've got source code
11 experts who are going to talk about how that's done, two source
12 code experts, and I think what this third party says about it
13 is prejudicial and cumulative and not necessary that it come
14 in.

15 THE COURT: Overruled. Same thing for 11, 31, and
16 32? What's MD?

17 MS. STOLL-DeBELL: Multiple documents, Your Honor.

18 THE COURT: What does that mean?

19 MS. STOLL-DeBELL: That there's more than one
20 document in the exhibit.

21 THE COURT: That's for number 32. Is that an
22 authentication -- I don't know that rule. I don't know Federal
23 Rule of Evidence MD. Does that mean it's -- is that sort of a
24 sub -- an abbreviation to say this is one aspect of the
25 authentication issue?

1 MS. STOLL-DeBELL: In this case, yes, but I'm going
2 to withdraw that objection. I think we have some multiple
3 document objections that we'll get into later, and we can
4 explain what the basis is for those, but for purposes of this
5 exhibit, I'm withdrawing that.

6 THE COURT: All right. The next category -- and I've
7 written on here what I've ruled on the white papers. Industry
8 analyst reports. There are probably, what, ten of them? Ten.

9 MR. ROBERTSON: Your Honor, I can withdraw
10 Plaintiff's Exhibit Number 187, Plaintiff's Exhibit Number 461.
11 I don't know how you'd like to proceed, Your Honor, if you'd
12 like to go through what the general objections are first, and
13 I'll tell you the reasons for their citation inclusion.

14 THE COURT: What are the research reports offered
15 for? It looks like it's the same objection as to all of them
16 except the last five have a Rule 26 objection attached to them.
17 I guess R-26 means an objection under Federal Rule of Civil
18 Procedure 26. Is that what it means?

19 MS. STOLL-DeBELL: Yes.

20 THE COURT: All right. The objection is it's not
21 relevant, it's prejudicial, and it's hearsay and not
22 authenticated. What are these things? Take 17 first.

23 MR. ROBERTSON: Yes, Your Honor. In fact, they're
24 relevant to several different issues that are involved in the
25 case. Number one, for proving willfulness we need to prove

1 notice, and a lot of these industry analysts reports, which we
2 have testimony from witnesses, for example, at Lawson, that
3 subscribe to and receive, for example, the Gartner report, the
4 Aberdeen reports, some of these other market analysis reports.
5 In fact, I took the deposition of a Mr. Frank --

6 THE COURT: Okay. So you've got people at Lawson who
7 received all of them?

8 MR. ROBERTSON: No, sir. Some of them will be
9 identified by Mr. Farber. There are also evidence of
10 competition between Lawson and ePlus because they both
11 reference -- many of them reference ePlus and Lawson together.
12 Apparently that's an issue, because Lawson has continued to
13 argue that we're not competitors in the marketplace, and
14 they're also -- many of them are relevant to the issue of the
15 secondary considerations of nonobviousness.

16 Many of them talk about our product and its success
17 in the marketplace, and even some of our competitors' success,
18 for example, that have taken licenses, and it also identifies
19 another secondary consideration as long-felt need under the
20 *Graham v. John Deere* case, a copy of which I brought with me.
21 The Supreme Court, in that 1966 case, has said, when
22 obviousness is raised as a defense, the Court and the jury, you
23 must consider the secondary conditions or secondary factors of
24 nonobviousness.

25 THE COURT: All these things are hearsay.

1 MR. ROBERTSON: Again, Your Honor --

2 THE COURT: Aren't they?

3 MR. ROBERTSON: No, sir. I think once again --

4 THE COURT: They are not hearsay?

5 MR. ROBERTSON: We think there's an exception to the
6 hearsay rule.

7 THE COURT: Okay, then the answer is, yes, they are
8 hearsay and I rely on.

9 MR. ROBERTSON: 803(17), Your Honor, which is the
10 same thing. In fact, for example, Gartner report is mentioned
11 in the first page of Lawson's 2010 annual report that came out
12 just last month, and I deposed a couple of witnesses with
13 respect to these industry reports. If I might just briefly
14 read, Your Honor.

15 "Do you do any market research with respect to
16 business opportunities in the industry sectors you've been
17 talking about?

18 Yes.

19 Are there any industry reports that Lawson relies
20 upon to understand the needs of the ERP market?"

21 That's enterprise resource planning.

22 "Yes.

23 Can you give me some examples?

24 The examples would be through our relationships with
25 some of the industry analysts, the Gartner Group, Forrester,

1 just to name a few.

2 Aberdeen?

3 Yes, in the past.

4 Which of those three we just mentioned do you
5 consider to be the most reliable as information about the
6 market?

7 Gartner."

8 THE COURT: Who are you deposing?

9 MR. ROBERTSON: Excuse me?

10 THE COURT: Who is saying that?

11 MR. ROBERTSON: That's the executive vice president
12 of Lawson, Mr. Frank.

13 "How often does the company receive reports from
14 Gartner?

15 On an ongoing basis.

16 Do you know how frequent" --

17 THE COURT: That takes care of Gartner. What about
18 the rest of them?

19 MR. ROBERTSON: He testified that he's used Aberdeen
20 in the past. But, again, Mr. Farber, also --

21 THE COURT: I don't see Aberdeen. Which one is it?

22 MR. ROBERTSON: Maybe I made a mistake, Your Honor.
23 There's another section where we have some of these industry
24 analyst reports in the next section which is --

25 THE COURT: I am not talking about the next section.

1 I'm talking about this one.

2 MR. ROBERTSON: I don't see the Aberdeen one here,
3 Your Honor.

4 THE COURT: Okay, so it comes in under 803(17), you
5 say. As to their hearsay and authentication, you're going to
6 put on through your witnesses or theirs; is that right?

7 MR. ROBERTSON: Yes, Your Honor. I might just make
8 an observation. I don't expect you to recall this, but we had
9 an agreement that was entered into by stipulation by the Court
10 in the initial pretrial order that says anything produced by a
11 party is deemed authentic.

12 THE COURT: You say that's in the initial pretrial
13 order?

14 MR. ROBERTSON: Yes, sir.

15 THE COURT: Well, then, this was all produced by
16 Lawson?

17 MR. ROBERTSON: 457, 458, 459, 462, 463, 465, 466,
18 all produced by Lawson.

19 THE COURT: Why doesn't the stipulation cover your
20 authentication exhibit?

21 MS. STOLL-DeBELL: It does, Your Honor.

22 THE COURT: Okay, well, don't make things like that.
23 Okay. 901 is overruled for all exhibits covered by stipulation
24 or by the pretrial order, and that's 457 through -66; is that
25 right? With the exception of 61. What about 17 and -- 61 is

1 withdrawn, exhibit is withdrawn. 17 and -- 17.

2 MR. ROBERTSON: Your Honor, ePlus produced those in
3 the litigation.

4 THE COURT: So it's not -- who are you going to have
5 authenticate it?

6 MR. ROBERTSON: Mr. Farber.

7 THE COURT: Okay. So it's overruled subject to
8 foundation. Why isn't it covered under 803(17)?

9 MR. McDONALD: Your Honor, if we can take some of
10 these one at a time, because they are a little different. I'll
11 start with the first one, PX-17, which is one of the ones that
12 was not produced by Lawson. We don't have an 803 objection for
13 that one. We understand this could be an exception to the
14 hearsay issue.

15 THE COURT: So you agree that it's admissible.

16 MR. McDONALD: No, no. I'm talking about that
17 specific objection. There's some other issues with this one I
18 wanted to address.

19 THE COURT: He says it's 803(17). It cleans it all
20 out.

21 MR. McDONALD: We didn't actually enlist 803 as an
22 objection to PX-17.

23 THE COURT: The point is, 803(17) responds to all of
24 your hearsay objections and, therefore, it's admissible under
25 803(17). What is your response to that?

1 MR. McDONALD: We don't have any other or any
2 problems with the 803.

3 THE COURT: Okay, so all of these come in under
4 803(17); right? All right. So all the hearsay and relevance
5 are overruled.

6 MR. McDONALD: Just hearsay is what we were talking
7 about there, Your Honor, not relevance; right?

8 THE COURT: What about Rule 26 down here on these, on
9 these Exhibits 462, -63, -65, -66? What is that objection?
10 What does that mean?

11 MS. STOLL-DeBELL: I think --

12 THE COURT: Rule 26 is a disclosure rule.

13 MS. STOLL-DeBELL: Right. So those documents, I
14 think to the extent that they want to use them as evidence of
15 secondary considerations, those documents were not disclosed to
16 us in their interrogatory responses, and we had two
17 interrogatories relating to secondary considerations asking for
18 all documents, all testimony, all arguments that they were
19 going to use to support their arguments of secondary
20 considerations, and they did, in fact, list a lot of documents,
21 Your Honor, in their interrogatory responses. They just didn't
22 happen to be these.

23 Now, I guess to the extent that they are relevant to
24 something like competition between Lawson and ePlus --

25 THE COURT: And notice.

1 MR. ROBERTSON: I'm sorry, sir?

2 THE COURT: And notice.

3 MS. STOLL-DeBELL: Right. I mean, I think how we'd
4 like to do it, we categorized these by issues we thought they
5 were relevant to, and so with regard to relevance, you know,
6 Mr. McDonald would like to address the notice issue. I would
7 like to address the secondary considerations issues, and then
8 Mr. Schultz would like to address the competition with Lawson
9 issue with regard to relevance.

10 THE COURT: Go ahead.

11 MR. McDONALD: On the notice issue, Your Honor, I
12 would note that actually Roman numeral V lists the ones that
13 even they apparently have grouped under the notice issue, and
14 these aren't in there. I think previously the only one in this
15 list that they really had indicated to us they might use as
16 evidence of willfulness was Plaintiff's Exhibit 17, and so we
17 could address that in the context of, I guess, Roman numeral V
18 as well --

19 THE COURT: Let's address it right now.

20 MR. McDONALD: These documents in Exhibit 17 is an
21 example of one that was not produced by Lawson. Lawson
22 produced at least a couple million documents in this case, and
23 these particular documents that they are relying on to try to
24 show Lawson knew about their patents or knew about infringement
25 claims by other companies, Lawson has never seen these

1 documents. In fact, all of our witnesses --

2 THE COURT: What does that have to do with whether
3 they are relevant or not? You are addressing relevance on the
4 notice issue.

5 MR. McDONALD: It has to do with the relevance --

6 THE COURT: If you've never seen it. If it's
7 admissible and it shows -- they can show that you received it
8 and it was -- or that it's out in the industry, why can't it
9 come in?

10 MR. McDONALD: We are talking specifically about for
11 notice for willfulness.

12 THE COURT: Whether you produced it is not the issue.
13 The issue is whether or not you know about it. Are you going
14 to have somebody say they know about what's in here or what?

15 MR. ROBERTSON: Your Honor, the witnesses have denied
16 notice about it, and Your Honor denied a motion *in limine* with
17 respect to these notice documents. We think the circumstantial
18 evidence, the shear, in a sense, Your Honor, volume of the
19 number of these documents that either were in Lawson's
20 possession --

21 THE COURT: This one wasn't. 17 wasn't. He says 17
22 wasn't produced by them.

23 MR. ROBERTSON: It wasn't produced by them. It was
24 produced by us.

25 THE COURT: That's fine, but did you then establish

1 that it was known to Lawson?

2 MR. ROBERTSON: The witnesses denied knowing anything
3 about ePlus --

4 THE COURT: Then how is it relevant? How does it
5 prove notice if they didn't know about it?

6 MR. ROBERTSON: Well, it shows -- relevant to this
7 competition issue.

8 THE COURT: We are talking about notice. Quit
9 shifting the ground. I can rule on one thing at a time.
10 Multi-task objections are not a good thing. Let's go.

11 MR. ROBERTSON: I don't have evidence that anybody at
12 Lawson saw it for purposes of notice, Your Honor.

13 THE COURT: Okay. So the objection is sustained as
14 to notice. Does it have anything to do with competition?

15 MR. ROBERTSON: Yes, it does, Your Honor.

16 THE COURT: Who is going to address competition?
17 Let's go.

18 MR. SCHULTZ: I will address competition, Your Honor.
19 With respect to competition, the only relevance with respect to
20 competition relates to whether there's an injunction after the
21 Court finds --

22 THE COURT: What does that have to do with anything?

23 MR. SCHULTZ: It has to do with when it's introduced.

24 THE COURT: No, we're going to have special -- the
25 answer is going to be, all the things I need for injunction the

1 jury is going to answer questions on. So it's going to be
2 decided.

3 MR. SCHULTZ: If that's the case, Your Honor, that's
4 the issue with respect to competition. We believe it's not
5 relevant in front of the jury for any other reason other than
6 competition.

7 THE COURT: Okay, objection overruled on competition.
8 So it's admissible -- 17 is admissible on competition. Is
9 there any issue on secondary considerations of nonobviousness,
10 long-felt need?

11 MS. STOLL-DeBELL: Are we talking about with respect
12 to --

13 THE COURT: 17. He said it's admissible for that
14 purpose, too. Do you object to its -- that's why it's
15 relevant, in other words. That addresses your relevance
16 objection.

17 MS. STOLL-DeBELL: Yes, Your Honor. I mean, talking
18 generally about ePlus's product, which Exhibit 17 relates to,
19 for it to be relevant to secondary considerations, they need to
20 be able to show that there's a nexus between that evidence and
21 the claimed invention. That is an absolute requirement for any
22 secondary considerations. When we look at ePlus's product,
23 they don't have any way to show that their product is covered
24 by the claims in this case.

25 THE COURT: This is part of how they're going to

1 offer -- you're saying there's no foundation because it doesn't
2 infringe?

3 MS. STOLL-DeBELL: We are talking about ePlus's
4 product, so if they're going to look at that and say, it shows
5 commercial success, they need to show their own product is
6 covered by the patent claim. So essentially they do need to do
7 the same analysis between the claims in their product as they
8 do with Lawson.

9 They have to show their product meets the claimed
10 invention, and they can't do so. They don't have any expert
11 testimony on this issue whatsoever. It's a complicated case,
12 Your Honor. We're talking about these software inventions, and
13 Dr. Weaver says nothing about it. Neither does Mr. Niemeyer.
14 There's no way for them to get that evidence in.

15 THE COURT: Okay, can't come in on secondary
16 considerations for that reason. Mr. Robertson, why can it?

17 MR. ROBERTSON: First of all, there's no requirement
18 that there be this nexus that we have to prove our own product
19 is covered by our patents through some sort of expert testimony
20 which is the suggestion.

21 THE COURT: Do you have to prove it's covered by the
22 patent?

23 MR. ROBERTSON: Well -- no, I don't think we have to,
24 but I think there will be testimony --

25 THE COURT: How do you prove the nexus? What nexus

1 are you talking about proving, and how are you going to prove
2 it?

3 MR. ROBERTSON: Well, the way the argument was raised
4 is in the context of proving our own product is covered by the
5 patent. There will be testimony from the inventors that the
6 patent specification itself was a blueprint for a commercial
7 embodiment that they then created, and ePlus acquired that
8 company that had those products and maintained it on a
9 continuum.

10 So the inventors will address the issue, and Mr.
11 Farber, certainly, president of ePlus Systems who has a
12 technical background and understands the functionality of its
13 own product can address that as well.

14 I can cite for the Court a number of federal circuit
15 court cases which have indicated simple testimony from an
16 executive of the company indicating that the product is covered
17 is sufficient. If the Court would like some cites, I think I
18 even brought some of the cases with me.

19 THE COURT: I don't need any cites for that. It
20 doesn't have to be proved by expert testimony.

21 MR. ROBERTSON: I'm sorry, sir?

22 THE COURT: It doesn't have to be proved by expert
23 testimony. For that matter, infringement doesn't have to be
24 proved by expert testimony, does it, in every case? Now, most
25 cases you have to, but is there some rule that says you can't

1 prove infringement if you don't have expert testimony? Isn't
2 that right?

3 MS. STOLL-DeBELL: I think as a general proposition
4 that's probably right, but you need to look at the technology
5 here. If you're talking about a simple mechanical device,
6 maybe that is true, but in this case, it is a complicated
7 software invention, and, Your Honor, I would cite your decision
8 from the WiAV case where you said that looking at claims
9 compared to a product in a complicated technical case is
10 something that should be done by an expert. I think the same
11 situation is true here.

12 Additionally, I want to bring to your attention your
13 order on ePlus's motion *in limine* number nine where they filed
14 a motion to exclude evidence relating to their commercial
15 products, and you granted the motion, and it wasn't just with
16 respect to infringement but also with respect to secondary
17 considerations, and I can read for you what the order says.

18 THE COURT: Do that since you have it there.

19 MS. STOLL-DeBELL: "To the extent that the proposed
20 comparisons are offered for the alternative purpose of proving
21 commercial success, the motion is granted because the
22 comparisons are of marginal relevance, and any probative value
23 is substantially outweighed by the risk of jury confusion."

24 THE COURT: Already ruled on, Mr. Robertson, she
25 says.

1 MS. STOLL-DeBELL: And further, in --

2 THE COURT: Wait a minute. If you've got the winner,
3 why don't you let the horses run ahead, see if it can stand --

4 MS. STOLL-DeBELL: I'm sorry, Your Honor. Mr.
5 McDonald will cover the microphone.

6 MR. McDONALD: I'm too slow, sorry.

7 THE COURT: You lost a long time ago, she says. Why
8 isn't she right? Sort of sounds like it.

9 MR. ROBERTSON: Your Honor, it's not accurate. Our
10 motion *in limine* asked for a ruling that they could not compare
11 their commercial system to our commercial system. That is
12 black letter patent law. You need to compare their commercial
13 embodiment --

14 THE COURT: What does the order say? Read the order
15 again.

16 MS. STOLL-DeBELL: I need to back up. It says, "It
17 is hereby ordered the motion is granted because the parties
18 agree that a comparison between the accused product and
19 plaintiff's commercial embodiment cannot properly be used for
20 the purpose of proving infringement or non-infringement.

21 To the extent that the proposed comparisons are
22 offered for the alternative purpose of proving commercial
23 success, the motion is granted because the comparisons are of
24 marginal relevance, and any probative value is substantially
25 outweighed by the risk of jury confusion."

1 And I think if you go back further, Your Honor, and
2 you look at the briefing that was done on this, that was what
3 they argued. They said, look, even if it's relevant for other
4 things, the jury's going to be confused, they're going to
5 perform this comparison anyway.

6 They had a statement in a reply brief that their
7 demonstration flat out should not be admitted for any purpose.
8 I can pull that up and read it for you if you give me a second,
9 but the fact of the matter is they actually won. They won
10 their motion to keep their product out, and now they want to
11 put it back in.

12 MR. ROBERTSON: Your Honor, that's just not what we
13 asked for.

14 THE COURT: I have a recollection that is what was
15 asked for in the briefing, and I think that's why that was put
16 in there, actually, if I remember correctly, into that order.
17 I don't have a perfect memory, but it sounds to me like that it
18 was dealt with in context of the motion number nine. You
19 prevailed, the ruling obtained, and it had a consequence you
20 didn't like. Now you want it reversed. That's what it sounds
21 like.

22 MR. ROBERTSON: I'm sorry it sounds that way. The
23 key phrase in the order is a comparison between our system and
24 their system can't be used for secondary considerations.
25 That's not what we want to do. We're not going to compare the

1 two systems.

2 We should be able to tell the jury that we have a
3 product out there in the marketplace, and our product has been
4 successful, and be able to at least show them information about
5 our product so that they understand competitive harm that we
6 are sustaining by the infringing activities of the defendant.

7 That's relevant to the willfulness that's going to be
8 at issue here. It's relevant to whether they know about us and
9 the competition that's in the marketplace. So that's what we
10 want to do with respect to that. We don't want to get here,
11 and we're not going to get up and say, look at our system and
12 look at their system, and that would be evidence of commercial
13 success. I don't think that comparison has any relevance to
14 commercial success.

15 But, again, the success of a product and the fact
16 that we're competing out there is relevant to the obviousness
17 issue, and it's relevant to the willfulness issue under the
18 *Read v. Portec* factors that the federal circuit looks to.

19 MS. STOLL-DeBELL: Your Honor, I found that quote
20 from their reply brief. It's docket 328 at page two, and it
21 says, quote, At a minimum, therefore, ePlus's demonstration
22 system of its commercial embodiment, produced in discovery,
23 should be excluded from evidence. Defendant does not proffer
24 any reason why this demonstration system would be relevant for
25 any of the limited purposes identified in its opposition brief.

1 The ePlus demonstration system would only be used, improperly,
2 to suggest comparison with defendant's accused products, and in
3 that respect would confuse and mislead the jury as to the
4 proper infringement analysis, end quote. So they did ask to
5 have it --

6 THE COURT: You asked for it, didn't you?

7 MR. ROBERTSON: First, specifically, it was only
8 addressed to the demo system, not all these other issues and
9 other pieces of evidence we're taking about. I did not want
10 the demonstration system put side by side with their system and
11 the jury becoming confused, because perhaps, quite frankly, the
12 look and feel of them are a little bit different.

13 In their functionality, they are really not different
14 at all, but the jury would have been confused if they had our
15 demo system right next to their demo system.

16 I didn't hear secondary considerations mentioned once
17 in that quote. I mean perhaps I missed it, but I didn't think
18 I heard it. So that was a very focused and specific request,
19 Your Honor, and, again, we're not planning on putting the demo
20 systems up side by side with the Lawson system.

21 MS. STOLL-DeBELL: Your Honor, I'm sorry. I had a
22 couple other things I wanted to raise if that's okay.

23 THE COURT: Go ahead.

24 MS. STOLL-DeBELL: First, they don't have a fact
25 witness who can compare their demo or their --

1 THE COURT: We're not going to use their demo. He
2 said he's not going to offer it; right?

3 MR. ROBERTSON: Yes, sir.

4 THE COURT: That keeps it out. That order does,
5 right? Yes. Don't fight the obvious. You just got up and
6 said it did. You said that order applied to that.

7 MR. ROBERTSON: I'm not going to object to it.

8 THE COURT: So you're not offering it. That's it.

9 MS. STOLL-DeBELL: For the record, I think it's on
10 PX-504 on the list today.

11 THE COURT: He's not talking about that exhibit or
12 that demo system.

13 MS. STOLL-DeBELL: They don't have a witness who can
14 say that their product today is covered by the claims. He's
15 mentioned two possibilities. He said the inventors can talk
16 about it. The inventors don't work for ePlus. They have never
17 worked for ePlus. They worked for Fisher back in the early
18 1990s when Fisher was developing its own product.

19 THE COURT: I understand, but he said that they
20 say -- what was it in the specification was the forerunner of a
21 specific product, the blueprint for a specific product that was
22 made by company X which company X ePlus bought, and it's that
23 product that he's going to talk about as evidence of secondary
24 consideration. Isn't that what you said, Mr. Robertson?

25 MR. ROBERTSON: To be sure, Your Honor --

1 THE COURT: Yes or no?

2 MR. ROBERTSON: Yes. It's a continuum.

3 THE COURT: And that's what he said. Why can't he
4 put that in? And if Farber knows about that, why can't Farber
5 testify to it? He's the president of the company, and that's
6 sufficient.

7 MS. STOLL-DeBELL: Because that's expert testimony.
8 For Farber to get up and say, look, our product meets these
9 elements of these 12 different claims --

10 THE COURT: He's not going to say that. He doesn't
11 have to show that it meets the patent. He has to show where it
12 came from. That's all he's showing, I think.

13 MS. STOLL-DeBELL: If that's all he's showing, they
14 haven't proven a nexus, Your Honor, which the federal circuit
15 has said over and over and over again, and, frankly, the
16 Supreme Court has, too, that for secondary considerations to be
17 relevant, you have to show that those secondary considerations
18 are for the claimed invention.

19 THE COURT: You show me a case that says that the
20 nexus has to be shown by proving that what's offered as
21 evidence of commercial success has to meet every element of the
22 claim that's in issue. Show me that case, and then I'll be
23 able to get myself sorted out with respect to it. Do you
24 believe that's the law? You said you didn't think it was.

25 MR. ROBERTSON: No, and I brought with me several

1 cases that show it's not law. One leading case is *Ryko*,
2 R-y-k-o, *Manufacturing v. Nu-Star*, N-u-S-t-a-r, 950 F.2d 714.
3 I've got a copy of the case if Your Honor would like it, but
4 the parenthetical was that the chief executive officer provided
5 testimony merely by affidavit that the car wash industry had
6 not solved its long-standing problems with automatic aviators,
7 or activators, excuse me, until a patented invention was
8 introduced. So the Court found sufficient prima facia
9 evidence --

10 THE COURT: Until what?

11 MR. ROBERTSON: The Court found --

12 THE COURT: Until what? You slipped through that.

13 MR. ROBERTSON: Until the patented invention was
14 introduced.

15 THE COURT: Okay. So that means the nexus is
16 provided by, covered by the patent. Doesn't it say that?

17 MR. ROBERTSON: Yes, sir.

18 THE COURT: So the guy got up and he said, our
19 patented product, which is covered by our patent, the patent
20 that's at issue. How come that doesn't prove her point rather
21 than yours?

22 MR. ROBERTSON: It met a long-felt need. We're
23 talking about a secondary consideration, and he wasn't an
24 expert. He was just the chief executive officer.

25 THE COURT: That isn't the point she's making. She's

1 saying there's no connection at all from Farber or anybody
2 else. That's the point she's making, not that you have to have
3 an expert to do it. She folded her tents on the expert issue
4 some time ago.

5 MR. ROBERTSON: I don't understand, Your Honor.
6 Farber can testify as to that. He's the president of the
7 company. He's got a technical background.

8 THE COURT: But it does have to show, he does have to
9 show that the product that you are talking about, your own
10 product, is covered by the patent; right?

11 MR. ROBERTSON: Yes.

12 THE COURT: Okay. Now, do you believe that Farber
13 can't testify to that?

14 MS. STOLL-DeBELL: I believe --

15 THE COURT: Or are you persisting in the view that an
16 expert has to testify to that?

17 MS. STOLL-DeBELL: Mr. Robertson is saying that he's
18 qualified, he's got a technical background. My position is
19 that Mr. Farber is going to get up and take the ePlus patent
20 and compare it to the claims which, I believe, is required, and
21 I can show you some case law on that. That is expert
22 testimony. That expert testimony --

23 THE COURT: All he has to do is say, look, we've got
24 an expert over here that tells us we've been selling this as
25 patented, as a patented product, it's covered by it, I'm told

1 that, boom. I think you are pushing that point too far.
2 Overruled. It can come in on secondary considerations but not
3 the demonstration model which has already been ruled on.

4 That's it. Let's go. I'm not going to sit here and
5 do this all day long. We are turning mother's picture to the
6 wall and moving on.

7 MS. STOLL-DeBELL: Okay. If I can just raise one
8 additional point. Their briefing on that motion *in limine*
9 number nine was not just limited to the demonstration system.
10 That was a quote I pulled out to read to you, but I can read
11 another one where they are arguing their entire commercial
12 product should not be in, whether it's user manuals or the
13 actual demonstration system.

14 THE COURT: What does it say?

15 MS. STOLL-DeBELL: It says, quote, Throughout
16 discovery in this matter, Lawson has requested and received
17 numerous documents, demonstration systems, and other
18 information related to ePlus's and its predecessors' electronic
19 procurement products and commercial embodiments covered by the
20 patents-in-suit. The details and features of ePlus's and its
21 predecessors' electronic procurement products and commercial
22 embodiments, however, are not relevant to the infringement
23 issues to be decided in the trial of this case.

24 THE COURT: He's not talking about offering it for
25 infringement. He's talking about for other reasons. Okay.

1 Objection overruled. 17 is coming in. Anything else on this
2 list, Roman numeral II? Everything else is coming in. Hearsay
3 objections are taken care of. The documents are offered for
4 notice respecting willfulness, competition in the marketplace,
5 secondary considerations of nonobviousness, and long-felt need.

6 Number 17 is admissible on competition and secondary
7 considerations. All the others, the objections to authenticity
8 and Rule 26 are overruled. The hearsay is overruled, and the
9 relevance are overruled.

10 Roman numeral III.

11 MR. McDONALD: Just to clarify, Your Honor, on the
12 notice issue with respect to the documents that were not from
13 Lawson --

14 THE COURT: There's only one. That's 17. It's
15 coming in. He can lay a foundation to show --

16 MR. McDONALD: I believe 187 was also --

17 THE COURT: I think he withdrew 187.

18 MR. McDONALD: I'm sorry, yes.

19 THE COURT: Number three, documents relating to
20 secondary considerations of nonobviousness. Authentication,
21 there are objections to 29, 41, 901 -- excuse me, I'm sorry.
22 295 and 412. Are those covered by the stipulation in the
23 pretrial order?

24 MR. ROBERTSON: We produced it, Your Honor.

25 THE COURT: You produced all those.

1 MR. ROBERTSON: 29, Your Honor, we produced. 41 we
2 produced.

3 THE COURT: Let's take the ones they produced.

4 MR. ROBERTSON: Your Honor, looking through this, I
5 think that we produced all of these.

6 THE COURT: Okay. So that stipulation doesn't cover
7 that. How are you going to prove authentication of these
8 documents? What are they? First, let's describe them.

9 MR. ROBERTSON: Sure. Generally, Your Honor, there
10 are a number of documents that show that ePlus has received
11 various industry recognition, commercial success documents
12 that, again, show long-felt need, documents that go to the
13 licensing of the patents which are all secondary considerations
14 of nonobviousness.

15 Many of these things also are relevant to the notice
16 issue, Your Honor, and they were relied upon by our expert on
17 validity, Mr. Hilliard, as showing awards and industry
18 recognition, award for --

19 THE COURT: Well, the fact that he relied on them
20 doesn't mean they come into evidence. It means he can base his
21 opinion on them, but they don't come into evidence merely
22 because they are something that an expert typically relies on
23 in that kind of discipline. So they don't come in that way.
24 If that's what you're trying to say, they are all gone.

25 MR. ROBERTSON: No, I understand.

1 THE COURT: Do you want to try some other argument
2 and leave that one behind?

3 MR. ROBERTSON: Well, these were in the possession of
4 my client, so Mr. Farber can address them, and a couple of
5 these were awards that the inventors received --

6 THE COURT: So you're going to authenticate them
7 through your client and through the inventors; is that right?

8 MR. ROBERTSON: Yes, sir.

9 THE COURT: Any other objection? If they do that, is
10 that okay?

11 MS. STOLL-DeBELL: That's okay on our authentication
12 objection, Your Honor, but, you know, if we want to take these
13 one by one, I can talk about what our issues are --

14 THE COURT: I don't. I want to take them by groups,
15 because I think you all told me these are the groups you agreed
16 I can take them by. Authentication is overruled.

17 MS. STOLL-DeBELL: But we have relevance and 403
18 objections, Your Honor.

19 THE COURT: I'm not dealing with that yet. These are
20 all the same kind of documents that show, they say, long-felt
21 need and commercial success. They are documents that show
22 awards received and the success, their success in the
23 marketplace. Is that right, Mr. Robertson? Have I basically
24 categorized them correctly?

25 MR. ROBERTSON: You have, sir.

1 THE COURT: Why aren't they relevant then for the
2 purposes, and they are offering them for the purposes of
3 commercial success, long-felt need.

4 MS. STOLL-DeBELL: If we can start with PX-29, Your
5 Honor, that one talks about the benefits of e-procurement, but
6 it doesn't mention ePlus, it doesn't mention any patents. I
7 don't think it mentions Lawson, so I don't know how it is
8 relevant in any way to whether the invention was commercially
9 successful.

10 THE COURT: How does that relate to commercial
11 success if it doesn't even mention you or your product?

12 MR. ROBERTSON: It addresses long-felt need in the
13 industry, Your Honor. It's a white paper addressing the need
14 and recognition that you need electronic procurement to make
15 cost savings in the industry. The old paper process is costly,
16 involves too many people, and so it's a recognition in the
17 industry that the type of product that my client invented and
18 owns has secondary considerations that show it to be
19 nonobvious.

20 MS. STOLL-DeBELL: First of all, the document is
21 dated 2001, so if we're looking at long-felt need, the relevant
22 time frame for that is around the time the invention was
23 created or before that, and I have a case for that --

24 THE COURT: When was that? I don't have that date in
25 my mind.

1 MS. STOLL-DeBELL: 1994 is when the patents were
2 filed.

3 THE COURT: '84 or '94?

4 MS. STOLL-DeBELL: '94, and this document is dated --

5 THE COURT: Seven years later.

6 MS. STOLL-DeBELL: Yes.

7 THE COURT: How can it show long-felt need, Mr.
8 Robertson, if it's seven years after your patent was granted?

9 MR. ROBERTSON: Because it's talking historically
10 about how e-procurement has largely been responsible for
11 replacing indirect procurement, corporate spotlight, and the
12 cost savings and opportunities inherent, and Aberdeen -- this
13 is an industry analyst -- has identified indirect procurement
14 as a significant opportunity for --

15 THE COURT: Does it tie it back to 1994?

16 MR. ROBERTSON: It's talking about what's developed
17 historically --

18 THE COURT: Does it take it back to 1994? Show me
19 what page.

20 MR. ROBERTSON: Your Honor, I can't find it --

21 THE COURT: Objection sustained.

22 MS. STOLL-DeBELL: The next one, Your honor, I have
23 on the list is PX-41. This document talks about the benefits
24 of SRM software which, I guess, is -- they call it supplier
25 relationship management software. I'm not sure that's even the

1 kind of software that's at issue in this case, so this --

2 THE COURT: Well, if you're not sure, who is? You've
3 been at it long enough --

4 MS. STOLL-DeBELL: I don't think it is.

5 THE COURT: -- and smarter than a cut cat anyway.
6 How come you can't tell me that it is or isn't?

7 MS. STOLL-DeBELL: I don't think it is. I certainly
8 don't think it's what the claims are talking about, but, again,
9 this suffers from the same problems as the last document. It
10 does not mention ePlus, it does not mention the patents, it's
11 dated 2001. It just is --

12 THE COURT: It says analysis, 2003 to '07, August of
13 2003, PX-41. Is that the one you're talking about?

14 MS. STOLL-DeBELL: I'm sorry. I have in my notes
15 2001. You're right, it's 2003, so it's even later.

16 THE COURT: How do you get this dog in? Don't you
17 want to put that one back in the kennel?

18 MR. ROBERTSON: I'll withdraw it, Your Honor.

19 THE COURT: All right, withdrawn.

20 MS. STOLL-DeBELL: The next -- Your Honor, if you can
21 just give me a minute. We had a little bit different list than
22 they did.

23 So, Your Honor, this document is about ePlus, 284.
24 It's talking about how ePlus was named to *iSource Business*
25 *Magazine's* top 100. Yeah, it's about the company. It's not

1 about the patented invention.

2 THE COURT: That doesn't necessarily mean it's
3 irrelevant or inadmissible.

4 MS. STOLL-DeBELL: Well, I don't think it's relevant
5 for secondary considerations --

6 THE COURT: What is it, 284?

7 MS. STOLL-DeBELL: Yes.

8 THE COURT: 275 must be the bestseller of all times.
9 It takes up four volumes. What is it, the functional
10 equivalent of *War and Peace*? All right, 284. This is a
11 document that talked about what a hot ticket company ePlus is.

12 MS. STOLL-DeBELL: That's right. And --

13 THE COURT: And you object to it why? It's 2003.

14 MS. STOLL-DeBELL: It's irrelevant to secondary
15 considerations because of the date, because it's talking about
16 enterprise cost management platform which is not the software
17 at issue in this case, and so it's not relevant and it's
18 prejudicial to put an award up there that doesn't relate to the
19 software they claim is covered by the claims.

20 THE COURT: You mean the mere fact that the commander
21 got the medal of honor doesn't prove anything in the case; is
22 that right?

23 MS. STOLL-DeBELL: Yes.

24 THE COURT: Sounds good to me. How come this
25 self-laudatory publication can come in?

1 MR. ROBERTSON: Well, it's a quote about *iSource*
2 *Business Magazine's* top 100 naming ePlus to that top 100 list
3 --

4 THE COURT: So what?

5 MR. ROBERTSON: -- for the products that are at issue
6 in this case.

7 THE COURT: Where? She says it's not. She says you
8 are talking about enterprise cost management and not the other
9 products, so help us out.

10 MR. ROBERTSON: Third paragraph, Your Honor, second
11 full sentence. "The company offers a suite of electronic
12 procurement, product and catalog content management." That's
13 what we're talking about. Then Mr. Farber, in the fourth
14 paragraph, testifies, "We are honored to be recognized for our
15 contributions to cost-effective sourcing and procurement and
16 for the value we provide to enterprises that use these products
17 and services."

18 So it is -- Mr. Farber will testify it's directly
19 about the product --

20 THE COURT: What are you offering it for?

21 MR. ROBERTSON: Commercial success, secondary indicia
22 of nonobviousness, Your Honor.

23 MS. STOLL-DeBELL: Your Honor, I think that first of
24 all, we need to remember this is an ePlus press release, and as
25 most press releases --

1 THE COURT: It's self-laudatory.

2 MS. STOLL-DeBELL: -- it's self-laudatory, but it
3 also says, look, we offer all this stuff, and it's -- this kind
4 of language about their procurement software is in every press
5 release. This is what we do.

6 The first sentence talks about its inclusion in this
7 award, why it was included in the award or this list of
8 *Magazine's* top 100, and it says, enterprise cost management
9 platform. So it's -- it may be an award, but it's not relevant
10 to this case, and it's prejudicial to Lawson --

11 THE COURT: Where does it say that?

12 MS. STOLL-DeBELL: Third paragraph, first sentence.

13 THE COURT: It came in -- it got the award because of
14 enterprise cost management platform; right?

15 MS. STOLL-DeBELL: That's my understanding of reading
16 this. Then it talks about --

17 THE COURT: Then it goes on to describe the company.

18 MS. STOLL-DeBELL: Yes.

19 THE COURT: Your basic argument is it's prejudicial;
20 while there may be marginal relevance to the substance about
21 the products they offer, it's prejudicial to present that
22 testimony in the context of this award document; is that right?

23 MS. STOLL-DeBELL: I wouldn't even say -- I don't
24 think it's of any probative value.

25 THE COURT: You can put a dog out here in the middle,

1 and mostly it would be relevant under the federal rules if you
2 could have anybody get up and say it had something to do with
3 something. So it is -- you don't even agree it's of marginal
4 relevance, okay.

5 MS. STOLL-DeBELL: It certainly is prejudicial.

6 THE COURT: Why isn't she right?

7 MR. ROBERTSON: Enterprise --

8 THE COURT: It says, "ePlus's inclusion in the list
9 reflects the effectiveness and maturity of its enterprise cost
10 management platform," which is not, she says, in this case; is
11 that right or wrong?

12 MR. ROBERTSON: Respectfully, that is wrong, and Mr.
13 Farber is going to tell you --

14 THE COURT: What's wrong?

15 MR. ROBERTSON: Innovative enterprise-wide solutions
16 and services is a generic term, platform upon which this
17 procurement product is included.

18 THE COURT: Wait just a minute. You're not answering
19 the question she raised. The first sentence says, in the third
20 paragraph, "ePlus's inclusion in the list," that is you've got
21 the list and the big award here, "reflects the effectiveness
22 and maturity of its enterprise cost management platform." She
23 says that isn't involved in the case. What do you say as to
24 that?

25 MR. ROBERTSON: It is involved in the case.

1 THE COURT: How?

2 MR. ROBERTSON: Because that platform is the product
3 that Mr. Farber then grills down and says in the second
4 paragraph exactly what the company is offering as part of that
5 innovative enterprise-wide solution. The solution and the
6 services he is referring to are then detailed in the next, the
7 third and the fourth paragraph where he gets very specific
8 about what the products are. And the products that he is
9 talking about are the products --

10 THE COURT: Does he have an inability to remember
11 this?

12 MR. ROBERTSON: Does he have an inability? No, he
13 remembers it quite well.

14 THE COURT: I don't think that he says any such thing
15 as that. How does he explain where a patented -- an infringed
16 product, or a patented product, excuse more, or something you
17 all do is in the enterprise cost management platform? Where
18 does he say that in this document?

19 MR. ROBERTSON: He can explain this document when he
20 testifies, Your Honor.

21 THE COURT: Good.

22 MR. ROBERTSON: What he's going to say is, when he's
23 referring to enterprise-wide solutions and services, and he
24 details that the company offers a suite of electronic
25 procurement products and catalog content management, that is

1 the innovative enterprise-wide solution and services. He
2 doesn't come right out and say it's patented, but that's the
3 product that is covered by the patent.

4 THE COURT: Okay. Objection sustained, Rule 403. He
5 can testify about it, but we're not going to put it in the
6 context of an award that doesn't specifically identify itself
7 as fitting into the category of a product or a patent issue
8 that's involved in this case. Let's go.

9 MS. STOLL-DeBELL: Next one is PX-285.

10 THE COURT: This is another --

11 MS. STOLL-DeBELL: Similar thing. It's another award
12 ePlus won. If you look at the second paragraph, Your Honor, it
13 says they won this award based upon a weighing of a number of
14 factors -- I'm on the fourth line -- "including overall dollar
15 increase in revenue, revenue growth in proportion to their own
16 size, profitability posture and improvements, and market share
17 gains."

18 THE COURT: I think he probably wants to withdraw
19 this exhibit, don't you?

20 MR. ROBERTSON: Your Honor --

21 THE COURT: Really, come on. We're not going -- you
22 aren't linking this to --

23 MR. ROBERTSON: The third paragraph says, "The
24 company offers a suite of electronic procurement, product and
25 catalog content management." That's the product that is the

1 commercial embodiment of the patent that they are offering.

2 That's why they got this award among --

3 THE COURT: That's not what it says. It says you get
4 it because you increase your revenue.

5 MR. ROBERTSON: By selling the patented product.

6 THE COURT: Get a handle on what's actually
7 admissible, and let's use that stuff. If your man can testify,
8 fine, but the objection is sustained as to the document under
9 403. 286.

10 MS. STOLL-DeBELL: Next one is 286, Your Honor. It's
11 the same thing. It talks about some kind of award they got.
12 The first paragraph says it's for leadership, financial
13 stability, and sustained growth. It's the same thing. Not
14 relevant, prejudicial.

15 THE COURT: It's the same thing, isn't it, as 285,
16 Mr. Robertson?

17 MR. ROBERTSON: Well, it just simply says that the
18 award was --

19 THE COURT: I know what it said.

20 MR. ROBERTSON: Enterprise cost management which
21 includes expertise in e-procurement, content management, and
22 supplier enablement. Those are the issues that are involved in
23 the commercial embodiment, Your Honor, and Mr. Farber can
24 certainly testify about that in relationship to this --

25 THE COURT: He can do it, and he can say, we've

1 received awards and been recognized in the industry, but this
2 press release talks about how well they've done financially
3 and --

4 MR. ROBERTSON: In the supply and demand area, Your
5 Honor.

6 THE COURT: I understand, but, you know, that's so
7 amorphous that it's of marginal relevance, and it's
8 outweighed -- it makes it look like you got an award for the
9 specific product when you sell a whole lot of other things, and
10 it's unfair. It opens up the ground for all kinds of
11 cross-examination and side issues that 403 is designed to cut
12 out. That's true for 29, 284, 285, and 286.

13 MS. STOLL-DeBELL: The next one is PX-287, Your
14 Honor. It's a white paper relating to ePlus's commercial
15 product. We had objected to it based upon our belief they
16 can't show a nexus, but I -- for that reason, it's not
17 relevant. It basically talks about what one of their products
18 is and what it does.

19 THE COURT: Who is going to show the nexus?

20 MR. ROBERTSON: First all, it's relevant to the
21 operations and functionality of our product which Mr. Farber
22 wants to be able to address on this competition issue.

23 THE COURT: Objection is overruled assuming there's a
24 foundation by Farber. 289 -- I mean 294. Riding Ariba. What
25 does Ariba have to do with anything? Ariba -- this is Ariba

1 gets an Aberdeen award. Now we've even won an award for Ariba.
2 Why do we want that?

3 MR. ROBERTSON: Because Ariba was an infringer and
4 it's a licensee, and it shows commercial success in the
5 industry of these products.

6 THE COURT: This doesn't show that.

7 MS. STOLL-DeBELL: It doesn't even say what product
8 was implemented.

9 MR. ROBERTSON: It says it in the first sentence,
10 Your Honor, successful implementation of Ariba's e-procurement
11 software.

12 THE COURT: So then you have to prove that in order
13 to -- that that means what they -- the products they sold that
14 infringed; right?

15 MR. ROBERTSON: I think Mr. Farber can say he
16 understands what product were in the marketplace. Ariba was
17 one. He was at the trial, the entire Ariba trial. He knows
18 what product was accused, and he knows that they are a licensee
19 who paid them a significant amount of royalties.

20 THE COURT: Sustained, 403. 295. Is this more of
21 the same? Why can't you -- if you all are just putting these
22 things in and they are all of the same ilk, why don't we just
23 agree that they would all be covered by the same ruling?

24 MR. ROBERTSON: Your Honor, this one actually has to
25 do with the first commercial embodiment of the patents.

1 THE COURT: PX-295.

2 MR. ROBERTSON: Yes. This Cornerstone product was
3 the first product, first commercially available product that
4 the inventors created right after the patent. That's what
5 Cornerstone was. So this is the invention.

6 THE COURT: 295, okay. First one is the
7 authenticity. Do you have any real objection to authenticity?
8 Do you want to withdraw that?

9 MS. STOLL-DeBELL: No, yeah, I'll withdraw that.

10 THE COURT: Okay, it's withdrawn.

11 MS. STOLL-DeBELL: So our issues, Your Honor, this is
12 similar to what we had before. Most of this stuff, it's a
13 whole bunch of documents put together in one exhibit. Most of
14 it just talks about what the product was, both Cornerstone,
15 also ProcureNet and SupplyLink, three different products.
16 There is one page in there that talks about an award.

17 THE COURT: This is not a document that belonged
18 together. Somebody just stuck it together?

19 MS. STOLL-DeBELL: It seems to me to be a whole bunch
20 of different documents put together. We do have that multiple
21 document objection.

22 MR. ROBERTSON: It's a printout from a website, Your
23 Honor, that all were linked together, so when it printed out,
24 it prints them out all together. It shows -- this was an
25 internet archive that shows when these inventors came out with

1 their first invention. The SupplyLink was just them taking
2 Cornerstone and applying it to the internet once the internet
3 opened up for commerce. So it was grouped together, Your
4 Honor, just because it was printed out --

5 THE COURT: What part of all of that brings it within
6 some kind of rule of evidence that allows it to be admitted as
7 a valid document when they say they object to it as a
8 compilation that doesn't -- that just is printed out from some
9 source that doesn't connect to anything?

10 MR. ROBERTSON: It was all from the same source.

11 THE COURT: That and a nickel will get you a Coke.

12 MR. ROBERTSON: I can break it up, Your Honor.

13 THE COURT: Break it up. What do you want to break?

14 MR. ROBERTSON: I'll do it along the lines that shows
15 that each page is a one-of-three --

16 THE COURT: I'm not going to sit here and go through
17 it while you do that. Why don't you see if you can revise the
18 exhibit and take away that objection.

19 As a basic proposition, if they have somebody who's
20 going to testify about the first commercial embodiment of the
21 invention, that person can use this document to testify and
22 explain what it is. That makes it relevant, and it eliminates
23 the 403 objection, it eliminates the hearsay objection because
24 it's offered for a non-hearsay purpose, not the truth of what's
25 in it but to show what the product is.

1 However, the fact that somebody has glommed together
2 a whole bunch of documents, some of which are press releases,
3 some of which are at times different than the first commercial
4 embodiment, precludes it as a valid exhibit even if it's proved
5 to be authentic from a website. It's confusing, and 403 would
6 keep it out. If you can restructure it in some way, then go to
7 it.

8 MR. ROBERTSON: I will restructure it, Your Honor,
9 but many of these, for example, identify awards that the
10 inventors won for their first commercial embodiment which was
11 ProcureNet.

12 THE COURT: You just go ahead and have them testify
13 about the fact they won awards, and you can have them say, this
14 is the award we won, but you can't stick all that stuff
15 together and put it in a document and make it look like it's
16 something. Where did you get the idea you can do that?

17 MR. ROBERTSON: Your Honor, I agree I will break it
18 apart, and I will just rely then on the most relevant of those.
19 Some had described what the early functionality was, and others
20 describe the awards they received.

21 THE COURT: As long as you do it with a witness,
22 that's okay.

23 MS. STOLL-DeBELL: Your Honor, regarding the award
24 issue, I'm not sure because it is a whole bunch of documents
25 together. I thought there was one award they won, and I don't

1 think it's tied to --

2 THE COURT: Let's just wait and see what they say.

3 MS. STOLL-DeBELL: Okay.

4 THE COURT: If they won it, they won it, and they can
5 say, this is the award we won. That's okay. But it takes
6 testimony, so you're going to revise that and build a
7 foundation.

8 308. Basically everything on this list, category
9 Roman numeral III, doesn't have too much merit to it and can't
10 get in. Maybe you'd like to reflect on whether you want it.
11 What is the next one?

12 MS. STOLL-DeBELL: It's some kind of --

13 THE COURT: What is it, 308?

14 MS. STOLL-DeBELL: This is just an ePlus white paper
15 relating to e-procurement, and I'm not sure what it's relevant
16 for. I don't think it is.

17 THE COURT: Okay, 308. Why is this relevant to
18 anything in the case?

19 MR. ROBERTSON: It's a white paper, Your Honor, from
20 my client that shows how they automated procurement. So it's
21 describing functionality of their commercial embodiment, shows
22 that we're in the marketplace and have a product and also
23 contains the patent numbers. You'll see at the last page of it
24 which --

25 THE COURT: This would have been one that should be

1 just as well left alone, shouldn't it?

2 MS. STOLL-DeBELL: Well, Your Honor, I think as you
3 see, they've got a lot of exhibits, and a lot of them relate to
4 damages, and they haven't pulled those out. This they were
5 going to use to show marking. That's not an issue anymore.
6 Whether they marked or not is not relevant, and it doesn't make
7 sense to waste the jury's time showing that they marked their
8 product. It doesn't matter.

9 THE COURT: I don't think that's why he was offering
10 it.

11 MS. STOLL-DeBELL: I think that was originally why it
12 was put on the list.

13 THE COURT: Now he's come up with some other reason.

14 MS. STOLL-DeBELL: Yeah.

15 THE COURT: It happens. Such is the nature of
16 litigation and life. We're addressing why it's being offered
17 now.

18 MS. STOLL-DeBELL: I don't know what issue it shows.
19 So it shows their product. We've got Farber testifying about
20 it. Why do --

21 THE COURT: You mean it's cumulative?

22 MS. STOLL-DeBELL: Pardon me?

23 THE COURT: Cumulative?

24 MS. STOLL-DeBELL: Yes, it's cumulative.

25 THE COURT: Okay, overruled. 401, 402, and 403 are

1 all overruled assuming you get a foundation for it.

2 412. You haven't pulled out the damage exhibits,
3 Mr. Robertson?

4 MR. ROBERTSON: That's not accurate, Your Honor. If
5 I can get a stipulation from them, but one of the things we
6 need --

7 THE COURT: Get a stipulation of what?

8 MR. ROBERTSON: On the commercial success of the
9 infringing product and the revenues they've generated from the
10 infringing systems. Now, there are some summary documents,
11 Your Honor. There are spreadsheets that are very, very
12 voluminous. I will admit that. They are produced in the
13 manner, I gather, from which the data is maintained at Lawson.
14 They generated these spreadsheets at our request with respect
15 to what was being accused in the case, and they create a very
16 large document.

17 What we did for that, Your Honor, which is recognized
18 by the Federal Rules of Civil Procedure and endorsed by the
19 federal circuit, is we created a Federal Rule of Evidence 1006
20 summary. The voluminous documents, and you're going to see
21 some other ones, Your Honor, don't have to come into evidence,
22 as you know, under Federal Rule 1006 when you take a large set
23 of documents --

24 THE COURT: As long as they are tendered so that the
25 other side can look at them and be prepared to cross-examine on

1 them, then they'll come in.

2 MR. ROBERTSON: That's right, Your Honor.

3 THE COURT: So what does this have to do with number
4 412?

5 MS. STOLL-DeBELL: It doesn't.

6 THE COURT: All right.

7 MS. STOLL-DeBELL: Our issue with 412 --

8 MR. ROBERTSON: Your Honor, I'll withdraw 412.

9 THE COURT: Exhibit withdrawn. 443.

10 MR. ROBERTSON: Your Honor, I might be able to
11 withdraw 443 and 444, but let me just raise an issue here.
12 Licensing also, under the *Graham v. John Deere* case, is
13 relevant --

14 THE COURT: To show commercial success.

15 MR. ROBERTSON: Yes, sir. So you have license
16 agreements on this list. We also have --

17 THE COURT: Is that what this is?

18 MR. ROBERTSON: No. These are printouts from our
19 licensees showing that they have licensed our patents. If the
20 license agreements come in, I can withdraw these. I think any
21 prejudice that the defendant was concerned about with regard to
22 the license agreements is now completely mitigated with respect
23 to the fact that we're not going to be putting a damages case
24 on in front of the jury, and the jury won't be able to give us
25 a damages award during this trial. So I think if the license

1 agreements are going to come in, I'll withdraw these.

2 THE COURT: Can't the fact of licensing come in to
3 show commercial success?

4 MR. McDONALD: Your Honor, I've got a couple of cases
5 that I can hand up copies that require a very specific nexus
6 for admissibility of licenses. You have to establish which
7 claims are incorporated in the licensing program and actually
8 tie it to the claims, and so they have no witnesses who can
9 testify that the SciQuest -- I mean, they said, we settled
10 those cases so quickly, we didn't even know what those guys
11 were selling. That's the SciQuest and the Verian and the
12 Perfect Commerce.

13 Nobody can testify as to what they were selling and
14 make a nexus here. One thing to keep in mind about the nexus
15 is, there were 78 claims of the three asserted patents in this
16 case. We're down to 12 now that are actually asserted at this
17 point, and to say, well, it's covered by a patent, one of these
18 patents, or the license refers to the patents, doesn't tell you
19 that the claims that we are saying are invalid are claims that
20 were commercially successful. So there's no witness that can
21 really tie any of these licenses in this case to the asserted
22 claims.

23 THE COURT: All right.

24 MR. ROBERTSON: Your Honor, licensing in and of
25 itself is a secondary consideration of nonobviousness. It's

1 not a commercial success secondary consideration. That would
2 actually be the royalty revenues that we have received pursuant
3 to these licenses. So this nexus requirement doesn't exist.

4 THE COURT: But what he's saying is that you have to
5 show that the license covers a claim in suit, and I think he's
6 right about that.

7 MR. ROBERTSON: It covers all of the claims of all
8 three patents, Your Honor, so it certainly encompasses the
9 claims that are at issue in this lawsuit.

10 THE COURT: Okay. If it covers all of them, what
11 difference does it make? Why isn't the nexus there?

12 MR. McDONALD: If they actually had a witness who is
13 going to say it's covered by all 78 claims, that might be the
14 situation, but that's not our situation.

15 THE COURT: No, no, no. It says it covers all
16 claims -- he's saying that the license covers all of the claims
17 that are at issue here. That's enough, he says. Why isn't he
18 right?

19 MR. McDONALD: Under the law, the *G.PAK* case,
20 *Muniauction*, *G.PAK* talks about you have to establish which
21 claims are incorporated into the licensing program to show that
22 the specific invention claimed here --

23 THE COURT: He's going to show all of them. He's
24 going to show that all of the claims are incorporated into the
25 licensing -- I come here, and I say, all of my -- I've got

1 great licenses here. I have all these licenses from these five
2 companies. That shows something. What does it show,
3 Mr. Robertson? What does the fact that I have -- that you have
4 licenses that cover all of these claims and you license them
5 out in the commercial world, what does that go to show?

6 MR. ROBERTSON: It shows industry recognition,
7 industry acquiescence in the face of the past.

8 THE COURT: What does that show?

9 MR. ROBERTSON: It shows that they are nonobvious.
10 That's one of the factors to consider. I got a bench brief
11 here on the admissibility of the prior license agreements if
12 the Court would like to look at it, but licensing under the
13 *Eibel Process* case, which is a Supreme Court case, says that
14 the fact that the patent holder was able to license the patents
15 is weighty evidence.

16 THE COURT: Evidence of what?

17 MR. ROBERTSON: Of nonobviousness. That others have
18 taken licenses. There is the *Minnesota Mining* case which is a
19 federal circuit case, 976 F.2d 1559 --

20 THE COURT: I understand. I think it's clear that
21 there are cases that hold that licensing of a patent can show,
22 can be used to show nonobviousness. That isn't the point Mr.
23 McDonald is making.

24 The point is you have a patent, you have a patent
25 license that covers, let's just say for purposes of the

1 discussion, a hundred claims. You are accusing, in this case,
2 only 13 of those products as being infringed by his products.

3 He's saying that unless you show a nexus, that, in
4 fact, it's confusing to the jury and may not have any -- or the
5 probative value is outweighed by the prejudicial effect. Isn't
6 that your argument, Mr. McDonald?

7 MR. McDONALD: Yes.

8 THE COURT: Why isn't that argument right now?
9 That's the point that needs to be addressed.

10 MR. ROBERTSON: Two practical considerations, Your
11 Honor. Number one is when you complete a case and you're going
12 to license the infringer, the infringer wants and demands a
13 license to every patent and every claim of that patent. They
14 don't take less than the whole, because they want to be done
15 with the case. It's a practical reality that faces every
16 patent owner every time they enter into a license agreement.
17 That took place in this case.

18 Secondly, if I had my druthers, Your Honor, I would
19 have sued them on every single claim, but Your Honor early on
20 told me I needed to narrow my case to 13. So I feel a little
21 bit --

22 THE COURT: I told you you needed to narrow it. You
23 narrowed it to 13.

24 MR. ROBERTSON: All right, Your Honor. In fact, I
25 have now narrowed it to 12, because I'm withdrawing one claim

1 because --

2 THE COURT: I'm going to give you an award like some
3 of those exhibits that I excluded.

4 MR. ROBERTSON: Thank you very much. So I find
5 myself in a situation where I can't license someone to less
6 than all of them, and they certainly include as a subset the 12
7 ones that we have chosen at the Court's suggestion to include
8 in this case. So I'd rather, if I could avoid, not get
9 whipsawed on that for having agreed with Your Honor that it
10 made sense to narrow them.

11 I would certainly expect, at the conclusion of this
12 case, if we are successful, and we resolve this by settlement,
13 you're going to see Lawson, just like every other licensee that
14 we have licensed, say they want a license to every claim of all
15 three patents so that they are done with us once and for all,
16 because they would never take less than a whole. That's just a
17 practical reality in the marketplace, Your Honor.

18 MR. McDONALD: The problem, Your Honor, is the
19 not-so-hypothetical situation is they sue somebody for
20 infringement, and they settle the case by taking a license even
21 though the product may not be covered by the claims. They just
22 settle the case to get rid of it, and by reducing the number of
23 claims, it actually would have been easier for ePlus to come in
24 with somebody to say, look, the specific asserted claims are,
25 in fact, practiced by these licensees, and they paid money to

1 ePlus for the right to practice those specific claims.

2 The *Iron Grip Barbell* case says, the mere existence
3 of a license under the patents is insufficient to overcome
4 obviousness. You have to show that nexus that's specific to
5 the claim. They note in that case it's often cheaper to take a
6 license than to defend the case. So just the fact that they
7 work it out -- and, sure, all these licenses in all these cases
8 talk about a license under all the claims of the patents. That
9 is not enough to show the nexus.

10 THE COURT: That doesn't apply to the license where
11 they had \$37 million to go with it.

12 MR. McDONALD: Even that was settled on appeal.

13 THE COURT: So what?

14 MR. McDONALD: It's not a final adjudication that
15 they were using any of the claims of the patents let alone the
16 12 asserted claims.

17 THE COURT: Actually, it is a final adjudication.
18 The final adjudication occurred in the district court, and the
19 fact that you settled is tough, but the judgment of
20 infringement is there. That's the *Bank of America* case, and it
21 hasn't been eradicated unless somebody removed it. I'm not
22 sure that has a whole lot to do with the case, with this issue.
23 All right, Mr. Robertson, why do you get in this over the
24 *Barbell* case? How do you get it in?

25 MR. ROBERTSON: I'd like to see a copy --

1 THE COURT: Why don't you do that while we take a
2 little break.

3
4 (Recess taken.)

5
6 THE COURT: All right. You were going to read about
7 barbells, but we got into this because you were going to
8 withdraw 443 and 444 of your exhibits if you could get
9 licensing, license agreements in. And then you -- I don't know
10 where we are now.

11 MR. ROBERTSON: Let me just say I've had an
12 opportunity to take a look at the *Iron Grip Barbell* case. I
13 observe -- I observe for all of these cases, I've never seen a
14 situation in any of the cases where there were just a
15 requirement to prove a nexus to certain claims in a license
16 agreement that were being asserted in another case.

17 What the -- the license in the *Iron Grip* case was a
18 license to the entire patent. As I indicated to the Court,
19 it's typical, if not incredibly unusual, that a license would
20 ever give less than all the claims in the patent, and the
21 nexus, I think, would be shown several ways, certainly by Mr.
22 Farber testifying as to his understanding as a person in the
23 marketplace, as a corporate representative in both Ariba and
24 SAP, as to his understanding of what -- and he negotiated the
25 licenses -- what, in fact, they covered, and it should subsume,

1 Your Honor, the claims that are at issue in this lawsuit, and
2 so I think that establishes the nexus.

3 My colleague, Ms. Albert, also points out to me that
4 several of the claims that were asserted and found to be
5 infringed in Ariba are also at issue in this case, and I
6 believe there's an overlap with respect to some of the claims
7 in SAP, but I'm not certain as I stand here right now.

8 Certainly, if we had to get down to the specific
9 granularity of the claim, I think that is evidence of the
10 nexus. I don't think the case law requires that. I think the
11 fact that they are patent licenses to the entire patents that
12 include these claims and Mr. Farber's understanding of the
13 circumstances and negotiations for those licenses should
14 satisfy that, and I will just note again that the *John Deere*
15 case says that this evidence, if available, must be considered
16 including licensing.

17 So, Your Honor, I would respectfully request that
18 these licenses be admitted since the prejudice that the Court
19 was concerned about prior and the issue with respect to damages
20 is no longer present.

21 MR. McDONALD: Well, when we were here last time
22 talking about Mr. Farber's testimony, I remember some
23 interaction about a part of his deposition where he had said
24 something about attorney/client privilege and he couldn't talk
25 about the settlements because of that and clarified that what

1 he really meant was that it was confidential information so he
2 didn't get to see it from the Ariba and the SAP cases.

3 So when Mr. Robertson says he can testify about it,
4 he hasn't testified yet, and when I tried to ask about the
5 circumstances of those settlements, he said he was not privy to
6 confidential information of SAP and Ariba. It was regarding
7 the sales information, but there's other attorneys'-eyes-only
8 information regarding the intricacies of the products that we
9 have never had a chance to see and he didn't testify about.

10 So I don't see how he's going to be able to testify
11 about that. We've never had a chance to probe that, and it was
12 not in their contention answers as something they were going to
13 do here to show, through Mr. Farber, that these products were
14 covered by the patents.

15 And by the way, just to clarify, I'm not saying that
16 patents have to be to certain claims of the patent. That's not
17 what this nexus is about. It's about the fact the license
18 alone doesn't really tell you what's going on. If somebody
19 simply buys a license to get away from a lawsuit but they don't
20 actually practice the claimed invention, that's the issue.

21 That's the gap in the evidence here, and that's the
22 nexus that is needed here when you have licenses, especially
23 here, specifically in the context of settling a case. That's
24 what the *Iron Barbell* case talks about, is when you have
25 settlements, you have to take a look about that.

1 Moreover, recall at the summary judgment we filed on
2 the marking issue that said, oh, SAP didn't have to mark, and,
3 therefore, that's proof of a failure to mark. It was ePlus
4 that came back in response to that motion and said, we can't
5 prove, nobody can prove that SAP is practicing the claims of
6 this invention.

7 So their failure to mark doesn't prove anything,
8 because they're not using the invention. There's no evidence
9 that they're using any of the claims, and now they're taking
10 the exact opposite position on that issue, and they have no
11 evidence that SAP or Ariba is actually practicing the claimed
12 invention.

13 MR. ROBERTSON: Mr. Farber's certainly seen all these
14 license agreements, he certainly testified about them, he
15 negotiated them. I think he maybe even executed them. What he
16 testified at his deposition was he hadn't seen the revenue
17 figures from Ariba and SAP because that was -- he mistakenly
18 said he thought was attorney/client privilege. It was actually
19 confidential information of a third party that he could not see
20 under the protective order.

21 Mr. Farber certainly knows the situations involving
22 why these patents were negotiated, how they were, and what the
23 products were at issue, and Ariba was found --

24 THE COURT: So are you telling me you're going to get
25 in here, and you're going to have them testify, have him

1 testify that there was litigation and they settled the
2 litigation and they had a license? Is that what you are going
3 to do?

4 MR. ROBERTSON: Even the *Iron Barbell* case doesn't
5 say that because it was a result of a settlement, a settlement
6 of litigation that it's precluded.

7 THE COURT: That wasn't raised, though, was it?

8 MR. ROBERTSON: It was noted that two of the licenses
9 were taken in settlement of litigation, so it was -- they were
10 aware -- that was not the basis. So that doesn't automatically
11 preclude it. I haven't seen a case that said just because
12 there's settlement agreements and a license results that --

13 THE COURT: Why would a case -- why would it be
14 probative that if I settled a case to buy peace, that that
15 shows -- you are offering this for obviousness; right? On the
16 issue of obviousness; right? Nonobvious, the converse; right?

17 MR. ROBERTSON: Yes, sir.

18 THE COURT: Why would that show that it's nonobvious?
19 I mean, license agreements offered in the commercial sphere
20 where people give and take and do a structure for an agreement
21 in a business context tend to show that they think it's -- it
22 tends to show probative -- it's probative of commercial
23 success. Why is a license negotiated under extorted conditions
24 of a lawsuit, why does it have the same probative effect?

25 MR. ROBERTSON: I disagree with the characterization

1 in this sense, Your Honor: It could be a factor, but it's not
2 the only factor.

3 THE COURT: What characterization do you disagree
4 with?

5 MR. ROBERTSON: There's always mixed motivation in
6 entering into a license agreement. Even when it's an
7 arm's-length transaction, the infringer who enters into it
8 voluntarily does so because he understands ultimately that the
9 threat of litigation is there. So that factor is always
10 present whether it's in the context of litigation or not.

11 Some people say a patent is only an invitation to a
12 lawsuit anyway, because the only way the patent owner can
13 obtain a license is to have a threat of litigation hanging out
14 there over a willing licensor who wants to be able to practice
15 the patent. That's what you found both in SAP, that's what you
16 found in Ariba.

17 Can that be brought up and perhaps the jury gives the
18 licenses less weight? Certainly. Can Mr. Farber be asked
19 about that in cross-examination? Yes. And maybe it's not the
20 strongest factor of nonobviousness, Your Honor, but it still is
21 a factor that has some tendency to establish a factor issue
22 which is obviousness.

23 THE COURT: I think the licenses can come in. I
24 think *John Deere* allows them in. So what does that do to
25 PX-443 and 444?

1 MR. ROBERTSON: I withdraw them.

2 MR. McDONALD: Your Honor, could we at least ask that
3 for the licenses, if they're going to come in, that the amounts
4 of them be redacted so the jury doesn't see that \$37 million
5 figure, that \$17 million from SAP? It seems like that, in
6 particular, is going to be prejudicial and inflammatory.

7 MR. ROBERTSON: Your Honor, the royalty revenues go
8 to commercial success under the *John Deere* case, and also the
9 other licenses, as Your Honor has pointed out, there's one that
10 was Verian for \$600,000. Now, that's going to come in as well,
11 and I explained -- if I could just explain, the Court noted
12 that at some point, the fact that license is so small is
13 because Verian's revenue base is only \$6 million. So that's
14 almost a ten percent royalty on that one license.

15 But those facts can come in. The jury can't do
16 anything anymore about awarding damages that they would think
17 would be disproportionate to what we can establish. That's out
18 of the case. So that prejudice isn't there, but the value of
19 the licenses show that the technology is important.

20 THE COURT: Anything else?

21 MR. McDONALD: No, Your Honor.

22 THE COURT: I don't think it's necessary to redact
23 the financial information from the licenses. It's pertinent
24 with respect to the commercial success. All right, four,
25 Lawson RFP responses to prospective customers, Exhibits 130,

1 275, 500, and 515.

2 MR. SCHULTZ: These documents are what ePlus has
3 designated as 1006 specifically relating to PX-130 and PX-500.
4 Excuse me, 515.

5 THE COURT: It says that 515 is a 1006 summary. The
6 other is, what, backup information, 130, 275, and 500; is that
7 what it is to 515?

8 MR. SCHULTZ: 275 and 500 are the backup information.

9 THE COURT: To 515.

10 MR. SCHULTZ: To 515, and also to 130. 275 is to
11 130. 500 is to 515.

12 THE COURT: Is 130 a 1006 summary as well? It
13 doesn't say it is.

14 MR. ROBERTSON: It's not, Your Honor. It was used in
15 a deposition which testimony has been designated. It was an
16 excerpt from a very large, voluminous document that we didn't
17 want to be able to use the entire document at deposition. So
18 we used certain excerpts to obtain admissions from a corporate
19 designee for Lawson.

20 MR. SCHULTZ: Your Honor, if I could address
21 Exhibit 130 based on what Mr. Robertson just said --

22 THE COURT: Wait just a minute. Let me look at it.
23 130 is a several-page document that has various pages in it.

24 MR. SCHULTZ: Exhibit 130 is a cutout of the parts of
25 Exhibit 275 that counsel for ePlus chose to use in the

1 deposition of Todd Dooner. In that deposition, the question
2 was, "Are you familiar with something called an RFP process?"
3 The answer to that question was, "No."

4 The witness also did not authenticate Exhibit
5 Number 8 that Mr. Robertson referenced. The only way that
6 that -- it's a hearsay document, but they're not using it as a
7 1006 compilation because it's a document that was put together
8 by counsel for ePlus. In particular, I'll read my objection
9 and Ms. Albert's --

10 THE COURT: This document is a Lawson document.

11 MR. SCHULTZ: No, it's not. It's a compilation that
12 was put together by ePlus's counsel. Here is my objection to
13 the document.

14 THE COURT: Wait a minute. You're saying that 130 is
15 part of 275. Is that what you're saying?

16 MR. SCHULTZ: I'm saying that it's pages that are
17 taken out of 275.

18 THE COURT: Well, okay, that's the answer, yes. I'm
19 just trying to figure out what you're talking about. All
20 right. 275 is this four-volume work; right?

21 MR. SCHULTZ: That's correct.

22 THE COURT: What is 275?

23 MR. SCHULTZ: 275 is a document that Lawson produced
24 that is RCF Express. It's a large document that relates to RFP
25 responses that Lawson has.

1 THE COURT: So 275 was prepared by Lawson; right?

2 MR. SCHULTZ: That's correct.

3 THE COURT: And 130 is excerpts of 275; right?

4 MR. SCHULTZ: That's correct.

5 THE COURT: So the text of 130 is text that was
6 prepared by Lawson; right?

7 MR. SCHULTZ: The actual text -- the compilation is
8 not.

9 THE COURT: Answer the question. Let's get your
10 tongue around yes and no and learn how to use it if you're
11 going to stay here. The answer to the question is that the
12 text of the parts of 130 that came from 275 is text that's
13 prepared by Lawson; right?

14 MR. SCHULTZ: Yes.

15 THE COURT: And your objection to this is that the
16 selections of text that comprise 130 is not -- is what? It's
17 hearsay?

18 MR. SCHULTZ: It's hearsay.

19 THE COURT: Why?

20 MR. SCHULTZ: Because it's not a document from -- it
21 is hearsay because it's an out-of-court statement that was
22 prepared by counsel for ePlus.

23 THE COURT: No, it isn't that. It's excerpts -- he
24 can put in all of 275, couldn't he?

25 MR. SCHULTZ: He could put in all of 275, that's

1 correct.

2 THE COURT: Then he could take from 275 a question
3 such as -- or a statement such as the one that appears on the
4 front page, and that wouldn't make it hearsay, would it?

5 MR. SCHULTZ: If it's ePlus who is preparing the
6 document --

7 THE COURT: No, no. I didn't ask you about preparing
8 the document. He can take this one quote -- let's call this a
9 quote. He can take the one statement on the first page of
10 Exhibit 130 and use it to present evidence.

11 MR. SCHULTZ: I agree with that.

12 THE COURT: It wouldn't be hearsay, would it?

13 MR. SCHULTZ: I agree with that.

14 THE COURT: Okay. The fact that he does that with
15 the first one and the second one and the third one doesn't make
16 it any more hearsay, does it? No, it doesn't.

17 MR. SCHULTZ: Correct.

18 THE COURT: Now, so we don't have a hearsay issue
19 here. We have a document, it seems to me, that the issue is
20 really a fairness question, because they have extracted text
21 out of context, I believe, is the objection. Let's see. Okay,
22 I have to give -- I don't use Rule 106 too much. What is that?

23 MR. SCHULTZ: Completeness, Your Honor.

24 THE COURT: Okay, completeness, that's your
25 objection. And then relevance and prejudice and then hearsay.

1 So the hearsay is overruled.

2 MR. SCHULTZ: Your Honor, with respect to 275, we
3 also withdraw our hearsay objection to that document.

4 THE COURT: Yes, I would think so. And your
5 authentication.

6 MR. SCHULTZ: That's correct. And also the MD, the
7 multiple document, that is not a multiple document.

8 THE COURT: And what is F?

9 MR. SCHULTZ: F is foundation. We also withdraw
10 that.

11 THE COURT: And now he says that if you're going to
12 use 130, you have to use it in context of 275.

13 MR. ROBERTSON: Yes, Your Honor. Let me --

14 THE COURT: Why isn't he right about that, because
15 you pulled this thing out and extracted different parts of it?
16 Why don't you have to take the document with the witness, or
17 take the document and say, this is part of this whole thing?
18 Why don't you have to do that?

19 MR. ROBERTSON: I likely might, but let me just give
20 you a little bit of background on this very briefly, Your
21 Honor. What 275 is, RFP Express is a collection, a compendium
22 of stock Lawson responses to customer inquiries about the
23 functionality of their products.

24 During a deposition, a witness identified that Lawson
25 prepares a large archive of standard answers to common

1 questions customers ask about this product and many others.
2 That's how the document was produced to us. Each one is sort
3 of a standalone answer to a question.

4 THE COURT: Like an FAQ on a computer.

5 MR. ROBERTSON: Exactly.

6 THE COURT: Go to the website and you can't get
7 anybody to help you, so you have to go -- unless you really
8 know how to navigate and go to the contact line somewhere and
9 go find somebody on the telephone, you have to go use the FAQs
10 first; right?

11 MR. ROBERTSON: Yes. The way this industry works,
12 Your Honor, is the customers put out a request for a proposal,
13 and it goes to multiple companies. It can go to Lawson, it can
14 go to ePlus, and you'll see some of these in a little bit,
15 specific ones, and they have to answer the question. It may be
16 the questions involve the absolute relevant functionality
17 that's at issue in this case. Do you have the capability of
18 providing us with multiple vendor catalogs; yes, we do. Do you
19 have the capability of providing us with multiple purchase
20 orders from a single requisition, things that are exactly at
21 issue in this case.

22 I deposed the executive vice president on this, and
23 if I can just briefly read you some excerpts, I won't read too
24 much. But it said, "You mentioned in one of your answers that
25 there's a library of FRPs. Do you recall that testimony?

1 I stated there's a library of FRP responses.

2 What is it?

3 It's a library of approved responses, templated
4 responses to standard types of questions, common types of
5 questions that we receive.

6 Question: So it's not unusual in this RFP process
7 for customers to have the same type of questions about the
8 features and functionality of the product," and I mentioned the
9 accused products.

10 He goes on to say how these are vetted by the legal
11 department and vetted by the engineers, and I asked, "It's not
12 Lawson's intent to mislead anybody about the features and
13 functionality of this software product; is that right?

14 That's correct.

15 So if we're looking at a response to an RFP with
16 respect to the features and functionalities of the products at
17 issue, we should be able to rely on the accuracy of that
18 information?

19 That's correct."

20 So when we had the deposition, we took out some of
21 these stock answers which are responses to standard questions
22 that are relevant to the accused software.

23 THE COURT: That's what 130 is.

24 MR. ROBERTSON: Yes, sir.

25 THE COURT: They are individually admissible, but

1 they are admissible in context of a question. So you can't
2 just pop the answer out. You have to have the question and the
3 answer. So what you do is mark 275 with little tabs, and
4 you've got the witness up here, and you have him go right
5 through it.

6 MR. ROBERTSON: Your Honor, 130 was only marked as a
7 separate exhibit because you're going to hear that we've
8 designated some of Mr. Dooner's testimony that related to that
9 specific exhibit. So we wanted to have the exhibit be there to
10 put those specific questions as to those specific pages in
11 context of the deposition testimony.

12 THE COURT: So they'll be used with the Dooner
13 deposition, and the Dooner deposition is going to provide
14 foundation; right?

15 MR. SCHULTZ: The Dooner deposition does not provide
16 foundation. In fact, he specifically says he does not know
17 what the document is.

18 THE COURT: What document?

19 MR. SCHULTZ: 130.

20 THE COURT: I know, but that's because they took out
21 the question. He knew what the big document was.

22 MR. SCHULTZ: No, that's incorrect. Mr. Dooner does
23 not know what the RFP Express is. He is a technical developer.
24 He has no idea what they do in marketing.

25 MR. ROBERTSON: He was asked questions about whether

1 or not the functionality that is described there as being
2 representative of true and accurate information was --

3 THE COURT: Did he adopt these answers?

4 MR. ROBERTSON: In large part, yes, he did.

5 MR. SCHULTZ: May I read his testimony?

6 THE COURT: I'm going to tell you something. What
7 I'm going to do is I'm going to ask the marshal to go open up
8 that door back there very soon if I have to get into this kind
9 of detail. Now, what is it?

10 MR. SCHULTZ: His testimony is that he's not familiar
11 with RFP Express.

12 THE COURT: I know that, but that doesn't make any
13 difference. If he read this statement, whether he's familiar
14 with it or where it came from or not, and he adopted it as his
15 own and said, this is correct, then that's a different issue,
16 and I think that's what Mr. Robertson is saying, but if he
17 didn't, then I want to know about it.

18 MR. ROBERTSON: I have a suggestion, Your Honor.
19 Since Mr. Dooner is coming live, and we have 275 which you
20 indicated I can flag, I will just flag it. I'll withdraw 130.
21 We're spending too much time.

22 MR. SCHULTZ: 500 and 515. 515 is the summary of
23 500. Under 1006, 515 is being offered. In order to have a
24 1006 admission, the underlying document has to be admissible.
25 There are two reasons why the document cannot be admissible in

1 the court.

2 First, in the contention interrogatories ePlus
3 disclosed regarding infringement contentions, it listed eight
4 specific RFPs and also in the contentions with respect to Dr.
5 Weaver. The document, Exhibit PX-500, lists multiple documents
6 that were not included with respect to ePlus's contention
7 interrogatories and, therefore, should not be included at this
8 point.

9 In addition to that, the parties agreed on August 4th
10 that they would only agree to the admission of 12 additional
11 exhibits that were inadvertently not placed on the original
12 exhibit list. What ePlus did is they combined approximately 28
13 documents in Exhibits 500 and 501 to get around that rule and
14 get around the stipulation of counsel.

15 For those two reasons, the underlying document is not
16 admissible, and, therefore, the 1006 summary should not be
17 admissible.

18 THE COURT: I don't understand what they did wrong.
19 Tell me what they did wrong again.

20 MR. SCHULTZ: Sure. In their contention
21 interrogatories, ePlus lists -- let me go back. Exhibit 500 is
22 a compilation of RFP responses.

23 THE COURT: You mean is taken from Exhibit 275?

24 MR. SCHULTZ: No. 275 is a completely separate
25 issue. Exhibit 500 is actual customers that Lawson has

1 responded to. There are approximately 28 customers and 28 RFPs
2 that are included in Exhibit 500.

3 ePlus only listed eight in response to its contention
4 interrogatories regarding what had constituted infringement.
5 It did not list any of the other RFPs that it now lists as an
6 exhibit. That's the first issue.

7 THE COURT: All right. So what do you say about
8 that, Mr. Robertson?

9 MR. ROBERTSON: The eight that were identified in the
10 contention interrogatory were the eight that were identified in
11 Dr. Weaver's report. He didn't have to go through all 500,
12 Exhibit 500 because he used what he needed for purposes of his
13 report. 500 is going to be relevant.

14 We need to go, and we need to cross certain Lawson
15 individuals with respect to other admissions contained in there
16 about the functionality of their products.

17 As Your Honor indicated earlier, we don't need to
18 prove infringement solely through an expert. We're going to
19 have lots of admissions as to the functionality of these
20 products from Lawson individuals. So there's no question about
21 its relevance, its authenticity.

22 I might just raise one further issue.

23 THE COURT: I thought you said -- I don't think they
24 objected to the authenticity.

25 MR. ROBERTSON: One further point I'd like to make,

1 Your Honor. This may tax your memory a little bit, but we were
2 -- back in March, we had a motion to compel on this whole issue
3 of implementation on a customer-by-customer basis, and at that
4 time, Your Honor granted the motion to compel and said if there
5 were any arguments with respect to implementation on the
6 customer-by-customer basis and they didn't answer that
7 interrogatory, then the door would be shut on that and there'd
8 be no further questions on it.

9 We have this document, which is a compilation, and we
10 also --

11 THE COURT: Which document?

12 MR. ROBERTSON: 500, which is the complete
13 compilation of the RFPs we have, and we produced from it this
14 FRE 1006 summary. So there's no question it's available to
15 them. I mean, it's their own documents from documents they
16 produced.

17 The FRE summary, which is 515, is simply the summary
18 of those admissions in those RFPs that tend to prove that the
19 accused product here infringes because it satisfies the claims
20 elements.

21 THE COURT: So 515 -- I mean 500 is all Lawson
22 documents.

23 MR. ROBERTSON: Yes, sir.

24 THE COURT: And it's a list, a number of documents.
25 It doesn't fit -- they don't belong together. You just put

1 them together.

2 MR. ROBERTSON: We put them together so they would be
3 together for the FRE compilation, because they are all similar
4 type of documents. They are all responses to RFPs, and so the
5 compilation under the rule --

6 THE COURT: What you would have done is taken 500 and
7 have -- how many are there? How many documents are there?

8 MR. ROBERTSON: I think it was represented 28, and I
9 don't have --

10 THE COURT: So you could do 500-A for one of them and
11 500-B and then 500-AA and 500-BB, and you'd have all 28 of them
12 listed there; right? And then there wouldn't be commingled
13 assembled documents. They would be separate documents; right?

14 MR. ROBERTSON: Yes, sir.

15 THE COURT: Okay, do that.

16 MR. SCHULTZ: Your Honor, that goes against the
17 stipulation of the parties that we could only have 12
18 additional exhibits. They listed 28.

19 THE COURT: What do you mean, 12 additional exhibits?

20 MR. SCHULTZ: The parties stipulated that after the
21 exhibit list was going to be filed with the Court, they could
22 only -- only with inadvertent exhibits that were omitted, we
23 would be limited to 12. There was a heated discussion back and
24 forth --

25 THE COURT: Why is this inadvertent? This was put

1 in, and it wasn't inadvertent. They just did it wrong.

2 MR. SCHULTZ: If it wasn't inadvertent, then it
3 wasn't against -- it was against the stipulation of the
4 parties.

5 THE COURT: Oh, come on. That's how many angels can
6 stand on the head of a pin.

7 MR. SCHULTZ: The bigger issue, Your Honor, is that
8 fact that --

9 THE COURT: Don't be taking up time talking like that
10 about things like that.

11 MR. SCHULTZ: These 28 documents were not in their
12 contention interrogatories. They are precluded because they
13 were not in those interrogatories.

14 THE COURT: Where is your objection on that? I don't
15 see that.

16 MR. SCHULTZ: That's the relevance.

17 THE COURT: Relevance doesn't have anything to do
18 with -- you're arguing that they violated Rule 26 or they
19 violated -- they answered an interrogatory, and they didn't
20 disclose it in an interrogatory; right?

21 MR. SCHULTZ: That's correct.

22 THE COURT: So that's a Rule 37 issue, not a
23 relevance issue. It's relevant if it's relevant, and relevant
24 evidence can be evidence that gets excluded because Rule 37
25 calls for its exclusion because they didn't do what they were

1 supposed to do in discovery, but the test for admissibility in
2 that situation is not the relevance test. It is the test of
3 Rule 37. Isn't that the correct analysis to be made?

4 MR. SCHULTZ: Yes.

5 THE COURT: And is that what your principal complaint
6 is?

7 MR. SCHULTZ: Yes, it is.

8 THE COURT: Then assert it. All right,
9 Mr. Robertson, address that.

10 MR. ROBERTSON: Your Honor, contention
11 interrogatories, none of the parties here identified every
12 single exhibit that they were going to offer on every single
13 issue in that case. All 100 of the Lawson exhibits are not in
14 all of their contention interrogatories, and we had one that
15 specifically said, give us every document you're going to use
16 in evidence to support your defenses.

17 So the parties put together contention
18 interrogatories that relied on documents, and Dr. Weaver relied
19 on samples of these --

20 THE COURT: But you have an obligation to update the
21 answers to your interrogatories, don't you?

22 MR. ROBERTSON: I don't know that this was called for
23 in the updated interrogatories, Your Honor --

24 THE COURT: Start with the answer to the question.

25 MR. ROBERTSON: Yes, we have an obligation to update

1 our interrogatories.

2 THE COURT: Why didn't you update them if you were
3 going to use them?

4 MR. ROBERTSON: I don't think this actually raises
5 any new issue that's not contained already in the infringement
6 response to the interrogatories.

7 THE COURT: What did the interrogatory say? Do you
8 have it? May I see the interrogatory, Lawson, that you say
9 they have offended?

10 MR. ROBERTSON: While they are looking for that, Your
11 Honor, I do know, my colleague reminded me that with this range
12 and in that request for --

13 THE COURT: What range?

14 MR. ROBERTSON: Excuse me. Let me start over. With
15 respect to the implementation interrogatory that Your Honor
16 granted the motion to compel on, part of the response was,
17 here's a base range of all of these RFPs and all of these SOWs.
18 SOWs are statements of war which actually reflect the contract
19 once the customer awards the bid to Lawson in response to a
20 request for proposal. So they gave us this and said, here --

21 THE COURT: They gave us what?

22 MR. ROBERTSON: The base range --

23 THE COURT: 500?

24 MR. ROBERTSON: Yes, sir.

25 THE COURT: They gave you a base range. You went to

1 look in the base range and found what is now Exhibit 500; is
2 that what you are saying?

3 MR. ROBERTSON: With the SOWs as well which is
4 another large voluminous document you're going to see as well.

5 THE COURT: Where is the interrogatory that you are
6 complaining of that they've offended that gives rise to a
7 sanction under Rule 37, unmade except now?

8 MR. SCHULTZ: I'm talking about the infringement
9 contentions.

10 THE COURT: What does it say?

11 MR. SCHULTZ: It's ePlus is required under the
12 Court's ruling to place its contentions with respect to what
13 constitutes infringement within --

14 THE COURT: They don't have to say everything they
15 are using to prove infringement. They have to say what is the
16 infringement. If that's the interrogatory, contention
17 interrogatory you are talking about, the interrogatory didn't
18 say list all the evidence you're going to produce to prove
19 infringement, did it? It would be an usual one if it did.

20 MR. SCHULTZ: What I'm saying, Your Honor, is in the
21 infringement contentions, they list eight RFPs, and they limit
22 it to eight. Now, after the parties have agreed that that's
23 what it was going to be limited to, they've now changed the
24 rules of the game.

25 THE COURT: You have here an issue that is an issue

1 of discovery. It's an issue alleged that if this can't come in
2 because it offends -- they violated the discovery protocols or
3 rules, and in so doing, you are entitled, Lawson, to Rule 37
4 sanctions.

5 It's not been properly teed up for decision here. I
6 have to see the interrogatory and the answer in order to make
7 that decision as to whether or not this evidence that they are
8 proffering now actually offends the rule. I don't have that,
9 so I can't make the ruling now.

10 MR. ROBERTSON: Your Honor, to bring one thing to
11 your attention, you may recall that there was a motion filed to
12 exclude Dr. Weaver and his theories after his expert report
13 came out, and Your Honor ruled on that, that, well, the
14 theories are articulated and a lot of evidence was cited, we
15 weren't precluded from actually having additional evidence as
16 long as it was in support of the same positions that Dr. Weaver
17 had taken throughout this case, and so the eight he's
18 referencing are the ones Dr. Weaver used to form his opinion.
19 The additional ones now we want to use with Lawson witnesses.

20 MR. SCHULTZ: Your Honor, based on what Mr. Robertson
21 is saying, is if it's an agreement between the parties that as
22 long as there was a disclosure with respect to a certain topic
23 area, that there are other documents that are related to that
24 topic area, that relate to that, we would stipulate to that,
25 and that would resolve this objection.

1 MR. ROBERTSON: What they are asking right now *sub*
2 *silentio*, Your Honor, is that you should overrule your ruling
3 on the Shamos report and the second supplemental statement.

4 THE COURT: Even I figured that out.

5 MR. ROBERTSON: Thank you, Your Honor.

6 THE COURT: I'm ruling one thing at a time, one issue
7 at a time, and I'll have to see what it says. All right.
8 You're going to have to brief it and submit it to me, because
9 it's not properly raised now. I can't rule on an
10 interrogatory -- I mean on an objection that somebody didn't
11 timely -- didn't supplement an interrogatory without knowing
12 what the interrogatory said and what the interrogatory response
13 said.

14 MR. SCHULTZ: I understand, Your Honor.

15 THE COURT: If anybody has got it, I'll be glad to
16 take a crack at it, but I can't do that. You all are
17 summarizing what they say.

18 What about the rest of these? Rule 106, to the
19 extent it requires that the underlying documents be admissible,
20 is satisfied, as I understand it, because all these documents
21 are Lawson's own documents constituting RFPs. They're just
22 going to be broken down so that they'll know each one is a
23 separate RFP. So that objection to 106 -- or that basis of
24 objection to the Rule 106 component is overruled. Nor does it
25 seem to me that there's an issue on relevance or 403, and the

1 multiple document is taken care of by sub labeling, so I'm
2 overruling the relevance issues.

3 MR. SCHULTZ: Your Honor, just for the record, the
4 403 objection was related to cumulative because there are
5 multiple documents that relate to the same thing. It's going
6 to be having one RFP after another relating to the exact same
7 thing.

8 THE COURT: Overruled. We're going to put it in a
9 summary. That's taken care of. If you all really want to
10 press this lack of compliance with the supplementation, then
11 you have to tee up in some way that makes sense, but I don't
12 have it in front of me now. I don't know how to rule on it,
13 and, frankly, my ruling would be it's too late to go through
14 all that. You haven't done it. You didn't do it even as part
15 of the pretrial order, so I don't know why I'm even having to
16 deal with it. I think it's a Johnny-come-lately, so I don't
17 even want to -- I don't think I'm even going to deal with it.
18 If you really thought that was a real problem, you'd have
19 brought it up in the right way, Lawson, so it's out.

20 Notice of patents, willfulness, and inducement.
21 What's all this?

22 MR. McDONALD: Your Honor, we touched on this back on
23 the second grouping with the one exhibit, PX-17, when we were
24 talking about how ePlus was saying they were going to try to
25 prove willfulness, and there were documents -- PX-17 was one of

1 them -- and this list here in this group five is another group
2 of documents that did not come out of Lawson's own files, out
3 of the millions of documents that Lawson had.

4 No witness has said they looked at these particular
5 documents, but ePlus wants to use them to say, well, they were
6 on some website somewhere like a smartmoney.com or
7 infoworld.com, et cetera, and so it's out in the ether, the
8 media ether somewhere, and, therefore, Lawson must have known
9 about it.

10 This flies in the face of the -- to prove
11 willfulness, you need to have not constructive notice but
12 actual notice to the accused infringement. So we don't think
13 these should be admissible for purpose of willfulness. I don't
14 think they are really offering them for any other purpose.

15 THE COURT: It says notice of patent, willfulness,
16 and inducement. Is notice of the patent pertinent to any issue
17 other than willfulness, Mr. Robertson?

18 MR. ROBERTSON: Yes, it is, Your Honor.

19 THE COURT: What?

20 MR. ROBERTSON: It's relevant to the issue of
21 inducement. In fact, notice or even just reckless indifference
22 to our patents is relevant because that's a required element of
23 induced infringement which are claimed are being brought when
24 Lawson assists its customers, aids, abets, and provides them
25 implementation services, et cetera. So induced infringement is

1 at issue, and that is an element we need to prove.

2 MR. McDONALD: On that note, Your Honor, we'd
3 stipulate that we have notice of infringement by May of '09
4 when they sued us. So if he wants to prove we used to induce
5 to infringe before May of '09, that's not relevant anymore
6 because damages is out of the case. We'll stipulate that we
7 had notice of infringement over a year ago.

8 MR. ROBERTSON: On the issue of willfulness, Your
9 Honor, it is also relevant under the *Read v. Portec* factors.
10 These are factors the federal circuit looks at to determine
11 whether the conduct was willful, the duration of the
12 infringement.

13 THE COURT: This doesn't have anything to do with the
14 duration. You can establish duration without getting into this
15 stuff. What is this stuff? This does -- it raises the hair on
16 the back of my neck to the level that I'd like to understand
17 more about it, but it doesn't raise my hackles.

18 MR. ROBERTSON: That's good to know, Your Honor. Let
19 me see if I can try and explain. You may recall there was
20 actually a motion *in limine* number six --

21 THE COURT: I do recall that, but what it was, I
22 don't know.

23 MR. ROBERTSON: It was directed to these documents.
24 In fact, it was entitled motion *in limine* number six to exclude
25 evidence of publications related to ePlus's patent enforcement

1 efforts, litigation, and this one is the settlement agreements.
2 It was denied as moot at the time. We moved for
3 reconsideration. Your Honor denied the motion for
4 reconsideration. The issue that has to go to this is, yes,
5 Lawson --

6 THE COURT: I denied wholesale an effort to wholesale
7 throw out a whole category as moot. I didn't deny particular
8 documents, objections to documents.

9 MR. ROBERTSON: Understood, Your Honor. I just
10 wanted to bring to your attention that this was raised and
11 argued before. What we argued at the time was, yes, the
12 witnesses at Lawson were very well prepped to say they didn't
13 know about ePlus or they didn't know about any of our efforts
14 to enforce. We said, you know, you have to be living under a
15 rock not to have heard about the litigation enforcement efforts
16 that we had out in the marketplace because it made --

17 THE COURT: Well, look, I was in the court where
18 these things happened, and I don't consider myself living under
19 a rock, and until Judge Spencer visited this case upon me I
20 didn't know anything about it.

21 MR. ROBERTSON: People in the industry took note of
22 this, Your Honor.

23 THE COURT: I know you say that, but how do you prove
24 that? You have to prove it.

25 MR. ROBERTSON: Because the circumstantial evidence,

1 and Mr. Farber will talk about this, that this gained a lot of
2 notoriety. There are articles in the *New York Times* here about
3 that, and so for them to say that they didn't know about it, I
4 think the jury can consider the enormity of the publicity that
5 this gained and find it's just not credible for someone in this
6 industry that competes head to head with ePlus, and we'll see
7 that when we get to the next category, would not be aware of --

8 THE COURT: Did you ask any of the witnesses, do you
9 read the *New York Times* regularly, do you read the trade
10 publications regularly, what do you keep up with? Now, did you
11 read them during the period of time when all this came out? In
12 other words, it is possible to lay the foundation that you are
13 talking about. My question is, did you lay it?

14 MR. ROBERTSON: I think we did, Your Honor, with
15 respect to several of the industry analyst reports that we've
16 been talking about here. You'll recall we talked about the
17 Aberdeen and Gartner report and the Forrester report, all of
18 these are the type of reports that were picking up in the press
19 because they were involved in this specific --

20 THE COURT: Okay, but do you have evidence from
21 somebody in the position up there to know, a responsible
22 person, I'm not sure who it is, but somebody in the -- I don't
23 want to use control group, but in the knowledgeable group who
24 regularly read this and got Gartner, he'd say, yeah, I got
25 Gartner, I got it every week, read it, took it to bed with me,

1 got up in the morning and read it, studied it, knew what its
2 contents were, yep. How about this one, did you pick up this
3 little notice here about an Ariba? Nope, didn't pick it up,
4 didn't know anything about it.

5 All of that is permissible evidence of what you're
6 talking about, but if all you're doing is to say there was this
7 large press about it, and you haven't connected that Lawson
8 read regularly the large press that it floated in, then I don't
9 think you get anywhere with it.

10 MR. ROBERTSON: I asked a witness, I believe it was
11 Mr. Frank, and I think there were others, on whether or not
12 they regularly received these kinds of industry analyst
13 reports. The answer was yes.

14 THE COURT: And you gave them by name, *SmartMoney*,
15 press releases, Gartner, article from *Supply & Demand Chain*, IT
16 Management, InfoWorld, *New York Times*, Computerworld,
17 Industryviews, did you ask him about all those?

18 MR. ROBERTSON: I asked him, and the other witnesses
19 were asked generically about those kind of reports, that they
20 were widely circulated through the company by email, that lots
21 of people read them, they relied on them for their competitive
22 analysis.

23 THE COURT: Did you establish, for example, that they
24 do competitive intelligence gathering?

25 MR. ROBERTSON: Yes, sir.

1 THE COURT: That this company does this, this is what
2 we do, we are a really good competitive intelligence gatherer,
3 we keep up with everyone we compete with. Did you ask them
4 then, do you have a list of who you competed with, is ePlus on
5 that list?

6 MR. ROBERTSON: We did.

7 THE COURT: Okay, so if you lay the foundation, you
8 can get this kind of information in. If you do not, you can't
9 get it in.

10 MR. ROBERTSON: I understand, Your Honor.

11 THE COURT: Isn't that the bottom line?

12 MR. ROBERTSON: I think that's right, Your Honor. I
13 intend to lay that foundation. I think we've already made
14 strides in that way along the deposition testimony. These
15 depositions were seven hours. It's tough to go over all of
16 this when you have to cover a lot of different witnesses.

17 THE COURT: Mr. Robertson, the way to deal with that
18 little problem is that if you have a need to go more than seven
19 hours with somebody, you say to the other side, how about let's
20 go more than seven hours. They say no. You say, we want to go
21 more than seven hours and we need to, and the Court says yes.
22 And I have never, ever but once that I know of said you can't
23 have more than seven hours, and that's because somebody was
24 sick.

25 MR. ROBERTSON: Perhaps I should have done that, Your

1 Honor.

2 THE COURT: Did you do that?

3 MR. ROBERTSON: No, sir.

4 THE COURT: Then don't cry about it. Let's move on.

5 MR. ROBERTSON: The only other point, we were
6 specifically going to ask the general question, or the general
7 question was asked, did you hear about it through industry
8 publications or otherwise.

9 THE COURT: What?

10 MR. ROBERTSON: Did you hear about it through
11 industry publications or otherwise, ePlus's success with
12 respect to enforcing its patents against Ariba, settling with
13 SAP.

14 THE COURT: And what answers did you get?

15 MR. ROBERTSON: Everyone said, no, we didn't know
16 about it.

17 THE COURT: The whole company just is see no evil,
18 hear no evil?

19 MR. ROBERTSON: That was the corporate designee's
20 testimony. Interestingly, though, when the motion *in limine*
21 was raised with respect to this, Lawson came forward with an
22 affidavit from a woman there who said there was only one report
23 that they say wasn't circulated.

24 Now, she was silent as to the rest. I found that
25 very interesting, that someone would come forward with an

1 affidavit to say only one wasn't circulated --

2 THE COURT: I'm sure you know what you're talking
3 about, but it presupposes a level of knowledge I don't have.
4 So I'm not able to follow your argument.

5 MR. ROBERTSON: Let me restate then, because that's
6 my failing. When this issue about these publications that were
7 out there for notice with respect to the enforcement activities
8 of ePlus was raised, in support of that motion, I think it was
9 in reply actually, they came forward with an affidavit that --
10 with a list of all of these, they said --

11 THE COURT: All of what?

12 MR. ROBERTSON: All of these publications, these
13 press releases, these industry analyst reports that are being
14 identified here for purposes of notice, they only averred that
15 one affirmatively wasn't circulated through the company. I
16 found that interesting --

17 THE COURT: In other words, they were confronted with
18 a list that has everything on it that's under heading number
19 five, and they did an affidavit that said, well, item number X
20 wasn't circulated, thereby permitting the inference that
21 everything else on the list was circulated. Is that what you
22 are saying?

23 MR. ROBERTSON: Yes. Item number X was PX-325.

24 THE COURT: Is that a particularly hot item because
25 it identified the Ariba settlement?

1 MR. ROBERTSON: It was -- yes, it was one of several,
2 but it was one that -- and Gartner is a report and publication,
3 of course, they admit receiving.

4 THE COURT: Okay. So why, if they lay the proper
5 foundation that you all regularly got these things and people
6 regularly read them and they did competitive intelligence
7 gathering like all companies do, or most companies do, and this
8 was among that database, and your people say, well, we didn't
9 know anything about that, why can't they go prove that in fact
10 the things they regularly read had all this information in it
11 and that it is reasonable for the jury to infer that they, in
12 fact, had actual knowledge of this situation reflected in those
13 articles, and why wouldn't that be probative evidence?

14 MR. McDONALD: Well, Your Honor, there's two groups
15 that met that item X which I'll talk about, and then we've got
16 everything else on this list --

17 THE COURT: Item X is Plaintiff Exhibit 325.

18 MR. McDONALD: That's the Gartner publication.
19 That's different because Lawson said, we do -- I think the word
20 is subscribe to Gartner, but the deal is that's a situation
21 where you can go to their website and download stuff, almost
22 like a LexisNexis type of subscription. So just because you're
23 a member doesn't mean you've read everything in the database.

24 So that declaration was specific about Gartner
25 because that's the only one on this list which Lawson, anybody

1 from Lawson even said they pay attention to. Nobody said, for
2 example, they pay attention to this first one, PX-42,
3 smartmoney.com or the press release --

4 THE COURT: Whether they pay attention to it is one
5 thing. It's whether they get it and read it.

6 MR. McDONALD: No evidence that they got any of those
7 other things, read them either regularly --

8 THE COURT: He says he's got the information that
9 says they did. Then you say they didn't. So how am I to deal
10 with that? The way I deal with that is, I'd say, they come in
11 if you establish a foundation. If you don't, it doesn't come
12 in. That's how I usually do it. Why would I not follow that
13 approach here? I can't rule on it ahead of time because you
14 two can't agree on what was asked. You want me then to go read
15 everything? I'm not going to go do that.

16 MR. McDONALD: I would challenge Mr. Robertson to see
17 if he would agree that with the exception of the Gartner
18 publication, they've got absolutely no evidence that anybody
19 from Lawson regularly or sporadically reads these other
20 publications.

21 THE COURT: Okay, Mr. Robertson, do you have that
22 evidence or not?

23 MR. ROBERTSON: No one reads the *New York Times*, Your
24 Honor?

25 THE COURT: Do you have evidence -- look, we can't

1 say the *New York Times* is out there, and, boy, it's incredible
2 that nobody reads it. Let me tell you, there are an awful lot
3 of people who don't read the *New York Times* anymore. I read
4 the *New York Times* every day for the whole time I was in
5 practice, and there came a time when I only went there when I
6 really wanted to because of reasons I don't need to get into
7 now.

8 MR. ROBERTSON: Your Honor, the answer is --

9 THE COURT: And I read the *Wall Street Journal* and
10 still do regularly, but I don't read it every day.

11 MR. ROBERTSON: Understood, sir.

12 THE COURT: So you can't get anywhere with that kind
13 of evidence. He says you have no evidence in the record that
14 shows that anybody, except as to Gartner, read regularly any of
15 the publications contained in Roman numeral V. Do you or do
16 you not?

17 MR. ROBERTSON: I can't speak to every single one,
18 Your Honor, but let me be frank. I'm certain we don't have it
19 with respect to every single one. I don't know right now which
20 ones I do, but I heard your foundational ruling.

21 THE COURT: Okay.

22 MR. McDONALD: It's a matter of hopefully working
23 this out before the witness is on the stand and these things
24 start coming out.

25 THE COURT: Well, you know, we can't always do that,

1 but that's what cautionary instructions and foundation and all
2 this stuff is about, and it sounds to me like maybe there
3 hasn't been the background examination, the foundation on
4 examination.

5 The ruling on these documents is that they are
6 admissible if a proper foundation is laid to show that the
7 Lawson people subscribed to or read or otherwise kept
8 abreast -- I've seen companies that, for example, there are
9 squibs -- somebody is tasked with the responsibility of
10 providing squibs from different newspapers about particular
11 topics. I know my law firm used to do that, and we would
12 circulate it, and I've seen other evidentiary people, other
13 evidentiary pieces where companies have people who say, on
14 these topics we keep abreast, and they are circulated. Then
15 they'll have September 7th, *New York Times*, boom, and then it
16 has a little squib about the article, whether it's the actual
17 article or excerpt from the article or summary, those kinds of
18 things. That's a way to keep abreast.

19 There are other ways to keep abreast. I don't know.
20 I know that the brokerage industry has regular calls, morning
21 call every morning, and a lot of that stuff doesn't get passed
22 around in written form, but every morning that information
23 comes out, and there's a record of what morning call topics
24 there are. So there's lots of ways to prove this thing, and
25 I'm not trying to circumscribe the proof, but it has to be

1 there.

2 MR. McDONALD: Your Honor, just to clarify then,
3 there are certain issues with individual ones of these
4 exhibits, but if I understand your ruling right, we can address
5 those if and when they come up during trial.

6 THE COURT: I'm going to take the issues. What else?

7 MR. McDONALD: Well, for example, on this Gartner
8 publication, there's a couple --

9 THE COURT: Wait a minute. Which exhibit? Give me
10 the number.

11 MR. McDONALD: PX-325 just as an example. That is
12 the one that we were specific about because there was evidence
13 that we have this subscription, and what that declaration
14 showed is that Lawson had gone through to find all the things
15 they had downloaded from Gartner, and this particular article
16 was not part of it. So we actually had affirmative evidence
17 that, you know, we did not download that one, A, and B --

18 THE COURT: You can put that in.

19 MR. McDONALD: And then, B, that one on page two,
20 it's got some prejudicial language in it that's actually
21 inconsistent with the *Seagate* ruling from the federal circuit
22 en banc on willfulness, because it talks about you should
23 review your software for patents known to be in dispute
24 regarding these infringement issues. I don't know if you have
25 that handy or you want to pull that up.

1 THE COURT: I was looking for the exhibit. I can't
2 find it. Okay, here it is. These numbers are... 325. What
3 now?

4 MR. McDONALD: On page two of that, there's a
5 statement in there about this ePlus/Ariba settlement and some
6 recommendations that this Gartner is making, and this is the
7 document I'm saying that we don't have a record of seeing it
8 anyway, but this is particularly prejudicial here under the
9 recommendation section because the context here is we now have
10 the federal circuit saying en banc that a company doesn't have
11 a duty to go out and get advice of counsel or review for
12 patent. That is not an affirmative duty that they have. They
13 used to, but they don't anymore. And then you have this
14 statement here, the second bullet point under recommendations
15 for ISV that says, undertake an extensive review of your --

16 THE COURT: What is the reason for that kind of
17 thinking?

18 MR. McDONALD: Pardon?

19 THE COURT: What's the reason for that kind of
20 thinking, that you don't have to go check, see if you are
21 infringing other patents?

22 MR. McDONALD: Well, there's a mountain of patents
23 out there. They realized that they were setting up something
24 that was different from any other area of law in terms of
25 triggering willfulness. We don't impose duties on people to go

1 find out about problems they are not already aware of.

2 THE COURT: Oh, my Lord. You're telling me that that
3 case stands for -- it's okay to be willfully blind? I don't
4 think -- give me that case again. I don't think that's what it
5 held. Give it to me again. I'll go read it.

6 MR. McDONALD: Maybe after lunch, Your Honor, I'll
7 give you the specific cite.

8 THE COURT: I don't think -- I remember what you are
9 talking about. Somebody else cited the case.

10 MR. McDONALD: The old standard used to say there's a
11 duty of due care that accused infringers would have that they
12 need to go seek and obtain advice of counsel if they're aware
13 of an issue there.

14 THE COURT: That issue had to do with getting advice
15 of counsel as opposed to keeping up. There's a big difference,
16 if I remember the case. Don't over-cite a case. That causes
17 trouble.

18 MR. McDONALD: Right. That's what I meant, is to
19 talk about in context of getting advice of counsel.

20 THE COURT: Well, it doesn't say anything about
21 getting advice of counsel.

22 MR. McDONALD: Well, it says, review your software's
23 functions against patents known to be in dispute. Known to be
24 in dispute, I guess maybe that doesn't apply here anyway
25 because I don't think there's any dispute here that Lawson

1 wasn't aware of their disputes specific to them.

2 I mean, I think what ePlus is trying to say is we
3 heard about somebody else getting sued, so we should have
4 assumed that maybe we would be next or something, but that's
5 not known to be in dispute. But if you put something like this
6 in front of the jury, I think this specifically is prejudicial.

7 THE COURT: You can handle that by redacting it.
8 That recommendation isn't an industry standard, is it,
9 Mr. Robertson?

10 MR. McDONALD: No evidence of that.

11 MR. ROBERTSON: Your Honor, I think you are exactly
12 right that the *Seagate* case doesn't stand for that proposition.
13 There's going to be a proper instruction to the jury on the
14 issue of willfulness.

15 THE COURT: That's not the issue. The issue is
16 here's a set of specific advice, which probably is pretty good
17 advice, but whether or not it's risen to the standard of
18 industry standard or not, and you tell the jury, give them this
19 document, and then if it comes in, then you can also argue,
20 well, did they undertake an extensive review of the software's
21 functions against patents known to be in dispute? No, they
22 knew this was in dispute.

23 I mean, I think he's got a point on the need to
24 redact some of this stuff. It's one thing to issue it. You
25 want this document for notice. If you lay the foundation, you

1 can get it in for notice, but you can't use it to set up a set
2 of rules that nobody -- that we don't have anything in the
3 record that establishes is an industry set of practices,
4 because then what you are doing is actually working in
5 constructive notice in sort of a backdoor way, and it just
6 creates all kinds of other problems that they have a right then
7 to come in and redress.

8 I think this is a good -- he's right that you need to
9 go through these documents and redact the things that don't go
10 to the notice point that you want to make.

11 MR. ROBERTSON: The notice is relevant to the
12 willfulness issue.

13 THE COURT: I know the notice is relevant to the
14 willfulness, but the notice is notice of what?

15 MR. ROBERTSON: Notice that you have to take --
16 exercise due care once you're aware of the patents and the fact
17 that this was --

18 THE COURT: But you are offering it to show notice
19 that they were aware of your patent.

20 MR. ROBERTSON: And didn't take reasonable steps to
21 avoid infringement.

22 THE COURT: Who is it to say -- this publication says
23 this is a reasonable step, but I don't know that this is a
24 reasonable step, and you don't have any evidence to say that
25 the industry says this is a reasonable step, do you?

1 MR. ROBERTSON: I have evidence from their witness
2 that says they rely on this report for their competitive -- on
3 these types of reports for their competitive analysis, and they
4 utilize them in making decisions about the company.

5 THE COURT: That's not the same question. You know,
6 if you want to ask the question -- look, think ahead when you
7 get an exhibit. You go look at it, you say, useful for this,
8 I'm going to ask this question. Then you can do it.

9 What you can't do is establish general information
10 and then come in and say, I've gotten -- I've touched all the
11 bases. What happens is, with that particular information is
12 that you left yourself standing about this far from home plate,
13 and you didn't score. So if you'd asked the question, do you
14 use these kinds of publications to help you guide what it is
15 you do, okay, and he said, yeah, we do that, then maybe it can
16 come in. That's what I'm taking about.

17 What I'm letting you do is put this document in, all
18 these documents in for the purpose of notice if you establish a
19 foundation -- the notice being that you had a patent and they
20 should have -- and it's pertinent to their willful infringement
21 of it, their state of mind in disregarding your patent's
22 rights. But I'm not letting it in for subsidiary stuff, and
23 you all have a duty to go out and talk with each other and
24 effectuate a proper redaction of the document. Then after
25 doing that, if you still have something that you need to fight

1 over, you can let me know, but I guarantee you you'll come to
2 the right result now that you know the general rule.

3 MR. ROBERTSON: Yes, Your Honor. Can I raise one
4 point of clarification?

5 THE COURT: What?

6 MR. ROBERTSON: With respect to something Your Honor
7 said, and that was it was represented that there was this
8 affidavit that said with respect to this one Gartner report, it
9 hadn't been circulated. My response to that is we identified
10 this Gartner report in our interrogatories supporting our
11 notice arguments and our willfulness arguments.

12 They had every opportunity to come forward with any
13 kind of rebuttal. This affiant, this woman who provided this
14 affidavit was never identified in their initial disclosures,
15 never identified in interrogatory answers, and gave an
16 affidavit for the first time well after the close of fact
17 discovery.

18 THE COURT: The affidavit can't come into evidence.

19 MR. ROBERTSON: Then the witness shouldn't appear
20 live either.

21 THE COURT: Why's that?

22 MR. ROBERTSON: Because they've never identified her
23 in initial disclosures --

24 THE COURT: What kind of ruling is that asking for?

25 MR. ROBERTSON: Because we asked who their witnesses

1 were going to be --

2 THE COURT: What kind of ruling are you asking for?

3 MR. ROBERTSON: Rule 37.

4 THE COURT: Right. Did you do that? When I went in
5 here and asked you -- the first thing I asked was, I said, is
6 there an objection to any of the witnesses listed. It was the
7 first section of the -- nobody spoke up.

8 MR. ROBERTSON: She's not on the witness list, Your
9 Honor.

10 THE COURT: Well, then, she can't testify. Why are
11 we talking about that?

12 MR. ROBERTSON: Because the suggestion was made she
13 could, and Your Honor said, then go ahead. So I just wanted to
14 clarify that.

15 THE COURT: I assumed that she was on the witness
16 list. Do you think I threw everything in the pretrial order
17 out because of that? No, I didn't.

18 Maybe it's a good time since we finished this topic
19 to go to lunch. One hour.

20

21 (Luncheon recess.)

22

23 THE COURT: Okay, we're on VI, Roman numeral VI.

24 MR. ROBERTSON: I believe that's the settlement
25 agreement, Your Honor.

1 THE COURT: License agreements. Well, we've really
2 just covered those, haven't we? I am concerned, though, about
3 the fact that they come in the form of a settlement agreement.
4 Is there some way we can extract the information without
5 throwing the exhibits in that show settlement?

6 MR. ROBERTSON: Settlement agreements and license
7 agreements is the title. I can redact settlement. It's a
8 grant of a license is what's going on --

9 THE COURT: I understand. I'm talking about the
10 content.

11 MR. ROBERTSON: Would you like me to summarize them
12 in an FRE 1006 perhaps?

13 THE COURT: Well, what do they look like? I just
14 don't know what they look like. 43 is one of them. I've got
15 the book of 300s here. Let's see what 320 looks like.

16 Well, I guess I'll just give a limiting -- the
17 redaction of that thing to make it -- to take the settlement
18 context out of it would basically just make it impossible to
19 understand, I fear. I'll just give a limiting instruction that
20 the fact that these people settled these cases is of no moment
21 here. It's sort like an instruction we give for codefendants'
22 plea agreement in a criminal case, that you can't consider it
23 for any purpose, whether or not -- you can't consider it in any
24 way as suggesting that Lawson has any liability here. If you
25 all want to draft up something, I'll be glad to take a look at

1 it.

2 MR. McDONALD: Your Honor, one issue that's relevant
3 to that, we weren't sure a step in the process today was the
4 right time to bring it up, but maybe now is the right time
5 because there is the issue of the limiting instruction before
6 the jury, and we were on the phone with you a couple weeks ago,
7 and an issue came up as to the jury and judge issues that
8 remain for the case after the ruling excluding damages.

9 THE COURT: I thought you were going to talk about
10 that and let me know what you think.

11 MR. McDONALD: We did talk about it, and I think
12 you'll see it in the pretrial order to some extent here. We
13 agreed -- I mean, I'm not sure the law is crystal clear on
14 whether there's still a right or not, but we were still able to
15 at least reach an agreement that we would still try to the jury
16 the issues of infringement and invalidity. So whether it's by
17 constitutional right or by agreement, I think we're in
18 agreement those issues go the jury.

19 I think we also agree that it's for the Court to
20 decide injunctive relief in the entitlement to attorneys' fees,
21 because I think that's something that both of us put on the
22 judge side of the pretrial issues to be tried.

23 The one place that we did not agree on is with
24 respect to willfulness. We believe that because willfulness is
25 not an issue for the jury on treble damages anymore because

1 there aren't any damages to treble, it's only relevant and it's
2 really only a subsidiary finding regarding attorneys' fees
3 because the statute, Section 285, doesn't say you get fees when
4 there's willfulness.

5 It says you get fees when the Court determines
6 there's an exceptional case, and there are cases that say
7 willfulness is certainly going to be a factor there, but there
8 are many cases where despite even if there was a willfulness
9 finding, the Court denies fees, and that decision is affirmed
10 under the totality of the circumstances.

11 There's also kind of a special consideration here in
12 that very relevant to the willfulness issue is whether there
13 are objectively and subjectively good-faith bases for Lawson to
14 believe that the patents are invalid. Well, right now every
15 one of the claims of all of the patents stand rejected at
16 various stages in the process, but all stand rejected as of
17 today at the Patent Office in these reexams that are pending.

18 We think that that's certainly very important
19 evidence ultimately for the Court to consider here. We
20 understand the Court has excluded that from the jury, but as a
21 practical matter, the jury is going to be making a finding on
22 willfulness really without having all the facts, including some
23 of the most relevant facts, and it's really not going to be a
24 particularly helpful finding for the Court --

25 THE COURT: What point are you making?

1 MR. McDONALD: Pardon?

2 THE COURT: What point do you want me to address?

3 MR. McDONALD: Ultimately what my point is, I believe
4 willfulness should be tried to the Court which could affect and
5 make it a little easier on a lot of these rulings about the
6 evidence related to willfulness.

7 MR. ROBERTSON: May I address that, Your Honor?

8 THE COURT: You think willfulness is a jury question.

9 MR. ROBERTSON: No question about it. I've got
10 several cases here. I can cite them to the Court, but let me
11 just cite a few.

12 THE COURT: I think Mr. McDonald agrees that
13 ordinarily it's a question for the jury. He's talking about in
14 context of the absence of damages which cannot be trebled.

15 MR. ROBERTSON: Totality-of-the-circumstances test,
16 Your Honor, so what he's suggesting is that somehow we have to
17 come back and hear a lot of evidence without willfulness all
18 again after the jury's left. That is not going to be very
19 efficient, but more importantly, it's a constitutional right,
20 I'm sure you understand, under the Seventh Amendment, and we
21 requested a jury trial on all issue triable to a jury, which
22 included all fact issues, and the case law is consistent that
23 willfulness, under federal circuit cases, and I can provide you
24 five or six right now that say that's a question of fact for
25 the jury, and we would like our constitutional right to a jury

1 trial on the issue of willfulness. And we think it's also
2 going to be the most efficient way to proceed.

3 MR. McDONALD: I believe there is some case law out
4 there, and I won't allege that it's real clear-cut, frankly,
5 under these circumstances, but I have seen some case law that
6 indicates that the form of relief is what dictates the right to
7 a judge or jury trial and also some case law that indicates you
8 determine that form of relief at the stage before trial, not
9 just at the pleadings stage where they allege damages, but at
10 this stage now where there's a determination.

11 At this point, there's no right to damages. It
12 becomes a case that's equitable. So from that starting point,
13 there wouldn't be a right, a constitutional right to a jury
14 trial. We can, however, agree to try the issues, the parties
15 can, and the Court may act on that agreement of the parties,
16 but that doesn't mean everything should be tried. Really it
17 should only be those issues that are agreed, and, moreover, I
18 just think it's a special case here with the specific issues we
19 have given the history and given the importance of these
20 reexams and the fact that treble damages is just not in the
21 case.

22 MR. ROBERTSON: Your Honor, it's simply not the law
23 with respect to willfulness. "Liability for willfulness of
24 infringement turns on consideration of intent, state of mind,
25 and culpability. We need not belabor that these are questions

1 of fact." That is the *National Presto* case, Your Honor, and I
2 can give you the citation for that if you'd like which is 76
3 F.3d 1185, a federal circuit 1996 case. I can also say to you
4 --

5 THE COURT: How did that come up? Did it involve a
6 situation where there was no longer an issue of damages?

7 MR. ROBERTSON: It did not, Your Honor, but that's
8 not dispositive as to whether or not we have a constitutional
9 right. I thought we had an agreement on the question. I
10 thought I had an agreement with Mr. McDonald who didn't raise
11 with me the issue of willfulness. He agreed that we should
12 have a jury trial. This is the first time I'm really hearing
13 this. I can brief it. Your Honor suggested at one point if we
14 can't reach agreement, we should brief it.

15 THE COURT: That's what I thought I told you to do.

16 MR. ROBERTSON: I thought we had reached agreement,
17 Your Honor. So I apologize. But the two lead cases are --

18 THE COURT: What?

19 MR. ROBERTSON: -- *In re: Lockwood* and *In re:*
20 *Technology Licensing Corp.*, which are both cases that were
21 petitions for mandamus when a jury question was denied with
22 respect to the fact issues.

23 We could waive it, but under that case law, if we
24 don't agree to voluntarily waive it, we're entitled to jury
25 trial on fact issues, and we want one, and we want one in our

1 willfulness case. And we think again, given that these are
2 questions that are unique to factual questions and the jury is
3 going to be hearing this evidence, it's a question that the
4 jury can process the information and make a finding, and then
5 the Court can act on it and determine whether or not it's going
6 to grant enhanced damages or not.

7 The other point I would make is, Your Honor, while I
8 understand the present status of our damages case, and I'm
9 certainly not going to sit here and reargue that, district
10 courts make decisions, and appellate courts review them, and
11 obviously we're going to be pressing, if we have to on appeal,
12 if this case doesn't resolve itself, review of your ruling on
13 damages.

14 If the case is then remanded, we'd simply have to
15 have a damages trial, and at that point, that would be, I
16 think, a fairly truncated affair. So at this point, we have no
17 intent -- my client hasn't authorized me to waive our right to
18 a jury trial.

19 THE COURT: I'm not sure what the point of all that
20 last statement was, but I believe that willfulness is an issue
21 that is triable to the jury ordinarily, and I don't think the
22 fact that there's an absence of damages deprives, changes the
23 equation.

24 There is some law that I remember that deals with
25 structuring, or that addresses the availability of a jury trial

1 in terms of the relief sought. One of the cases is a Supreme
2 Court case. Is it the *Dairy Queen* case I'm thinking of?

3 MR. McDONALD: I believe *Dairy Queen v. Wood* is
4 relevant to this. I think that was a case that involved
5 equitable and legal issues, and they decided the common issues
6 should go to a jury if it was overlapping between legal and
7 equitable, but there is discussion I believe in that case that
8 to determine whether you get a judge or jury trial, you look at
9 the form of relief, was it traditionally in a court of law or
10 court of equity.

11 MR. ROBERTSON: There's also, Your Honor, the *Beacon*
12 *Theatres v. Westover* --

13 THE COURT: *Beacon Theatres* is what I think I was
14 talking about.

15 MR. ROBERTSON: They are both cited in the two cases
16 I mentioned, *In re: Licensing Technology* and *In re: Lockwood*,
17 and the analysis turns on whether it was triable as a question
18 of fact at the time that the Seventh Amendment was adopted,
19 traditionally at law or traditionally at equity, and it's
20 interesting in a patent case, but it turns on the -- the patent
21 owner is the -- owns the right and can control the outcome, is
22 what that decision says, by asking for it and requesting it.
23 It does not turn on whether or not there's injunctive relief as
24 the only thing remaining in the case.

25 THE COURT: They decided that?

1 MR. ROBERTSON: It's -- to be perfectly candid, Your
2 Honor, it is dicta in the *In re: Licensing Technology* case, but
3 it's pretty strong dicta based exactly on a fact pattern in
4 which the damages case was struck, but then the -- or struck in
5 large part, and then the patent owner waived the jury right to
6 trial by voluntarily dropping his case.

7 It turned on whether it was voluntary or involuntary,
8 and, quite frankly, Your Honor, as you know, it was most
9 certainly involuntarily in this case. I would suggest that
10 those cases would be very instructive on this point.

11 THE COURT: You're going to have to brief it if you
12 don't agree, and so since you think that the right has been --
13 there isn't any right to a jury trial on the willfulness issue,
14 you start, Mr. McDonald. How long will it take you to file a
15 brief?

16 MR. McDONALD: One week, Your Honor?

17 THE COURT: All right.

18 MR. ROBERTSON: I'm sorry, Your Honor. Lawson's
19 briefing first?

20 THE COURT: Don't you think, or do you want to brief
21 first?

22 MR. ROBERTSON: I'd like to brief first, Your Honor,
23 because I think it's our right, and I think I'd like to
24 demonstrate --

25 THE COURT: He's asserting that you don't have the

1 right. Yes, it is your right -- I mean -- he is the movant.
2 He's the one who is saying actively you shouldn't have the
3 right. Ordinarily I would consider him the movant.

4 MR. ROBERTSON: All right, Your Honor.

5 THE COURT: Yours is sort of -- your posture would be
6 sort of a requesting declaratory relief on the point. I'm
7 going to let him go first. When do you want to go?

8 MR. ROBERTSON: I'm sorry, when was --

9 MR. McDONALD: I thought I asked for a week or ten
10 days, Your Honor.

11 THE COURT: Let's get a date.

12 MR. McDONALD: October 7th, I believe that would be.

13 THE COURT: All right. And then when do you want
14 your reply? You can be reviewing it in the meantime, can't
15 you?

16 MR. ROBERTSON: Yes. Could I have seven days to
17 respond?

18 THE COURT: What?

19 MR. ROBERTSON: Seven days to respond.

20 THE COURT: So that would be the 14th?

21 MR. ROBERTSON: I'm advised by my colleagues, with
22 all our commitments, if I could have the same indulgence of ten
23 days, Your Honor.

24 THE COURT: So what's that, the 18th, 19th? Just
25 tell me.

1 MR. ROBERTSON: I don't have a calendar in front of
2 me.

3 THE COURT: You weren't going to be doing anything
4 for two weeks. You were going to be trying this case. What
5 are you talking about, all your commitments? What have you
6 done, gone out and taken a vacation?

7 MR. ROBERTSON: October 18th, Monday.

8 THE COURT: Sure. You file your reply on the 22nd.

9 MR. McDONALD: Thank you, Your Honor.

10 THE COURT: All right, I'll decide it on the papers
11 unless I think I need argument on it. All right. That brings
12 us to Roman numeral VII. How many Roman numerals are there,
13 for Pete's sake?

14 MR. SCHULTZ: Roman numeral VII, Your Honor.

15 THE COURT: ePlus's competition with Lawson.

16 MR. SCHULTZ: We will withdraw our objections to
17 PX-139 and PX-468, and we will also withdraw our hearsay and
18 foundation objections to 140. Your Honor, there's two issues
19 with respect to --

20 MR. ROBERTSON: I might be able to save us a little
21 bit of time here. I'll withdraw PX-139. I'll withdraw PX-144.
22 I'll withdrawn PX-300, and I'll withdraw PX-335.

23 THE COURT: Okay. Relevance objection to 140.
24 ePlus's RFP response to Indalex.

25 MR. SCHULTZ: Your Honor, I can group all of these

1 documents into one category with the exception of PX-314. 314,
2 with respect to hearsay, it is a document that is prepared by
3 Wolters Kluwer, and there's no foundation with respect to any
4 exception to the hearsay rule.

5 THE COURT: How do you qualify -- who is Wolters
6 Kluwer?

7 MR. SCHULTZ: Wolters Kluwer is a company that ePlus
8 was responding to -- well, this document is Wolters Kluwer,
9 it's an RFP request that goes through the requirements that a
10 company would need to do in order to respond to an RFP from
11 Wolters Kluwer.

12 MR. ROBERTSON: Your Honor, I'll withdraw it.

13 THE COURT: Exhibit 314 withdrawn.

14 MR. SCHULTZ: With respect to the other documents,
15 Your Honor, Lawson's objection to the documents and ePlus's
16 competition with Lawson is twofold. First, we do not believe
17 that it is relevant with respect to anything dealing with
18 notice, and I'm not sure if ePlus is arguing that these are
19 relevant to notice, but if they're not relevant to notice, we
20 just want confirmation as to that.

21 THE COURT: He's basically saying he's got a
22 relevance objection to all of them; right?

23 MR. SCHULTZ: Correct, the relevance objection as to
24 the notice aspect. They list them here as competition, but we
25 do object to these on the relevance grounds with respect to

1 notice.

2 THE COURT: Do you object to them with respect to
3 competition?

4 MR. SCHULTZ: With respect to the competition, Your
5 Honor -- with respect to competition, we believe that it is
6 something for the Court to decide, that it is cumulative with
7 respect to the jury, that there's multiple documents here that
8 say the same thing, that the jury does not need to hear this.

9 The only reason that the competition documents are
10 relevant relates to the injunction issue which the Court has
11 the decision on. We've addressed this already, and Your Honor
12 has said that the Court would ask questions of the jury. We
13 respect that ruling; however, the relevance that I'm interested
14 in at this point is the notice issue.

15 THE COURT: Okay.

16 MR. ROBERTSON: Your Honor, 468 is specifically a
17 memorandum from a Lawson individual --

18 THE COURT: Objection to that is withdrawn.

19 MR. ROBERTSON: He asked me about notice on that one.

20 MR. SCHULTZ: I'm talking about all of these
21 documents with respect to notice. If I could clarify, maybe
22 the Judge had not ruled with respect to the competition
23 documents, but we had previously discussed that issue.

24 THE COURT: I haven't ruled with respect to the
25 competition documents, but we did have a discussion on

1 competition, and you said it was a question that related to
2 something the Court had to decide, and I said we're going to
3 submit questions to the jury that I can use in framing an
4 injunction.

5 MR. ROBERTSON: Your Honor, we do think this is
6 relevant to competition. This is direct competition.

7 THE COURT: What does competition have to do with it?

8 MR. ROBERTSON: Well, one, it's called into the
9 injunction certainly.

10 THE COURT: What else?

11 MR. ROBERTSON: It's relevant to willfulness, Your
12 Honor, under several cases including one here in the Eastern
13 District of Virginia which talks about whether or not, under a
14 number of multifactor tests for determination of willfulness,
15 whether or not the defendant had any motivation for harm, and
16 the evidence of that often is evidence of competition.

17 Judge Ellis had a decision in the Alexandria
18 Division, a case where I was counsel actually, and found, when
19 he went through these factors, and these are the *Read v. Portec*
20 factors I've been discussing this morning, that there was no
21 motivation for harm because the two parties did not compete
22 with each other. Certainly by implication, if there was
23 competition, that would have provided some evidence of harm.

24 There's also --

25 THE COURT: Do you need more than just the fact that

1 they're competitors to draw an inference of motivation to harm?

2 MR. ROBERTSON: I could probably whittle these down,
3 Your Honor, but there have been so many representations in this
4 case that ePlus and Lawson don't compete with each other.
5 These are specific customers that we're going toe to toe with
6 Lawson, and some of the RFPs even mention that Lawson is our
7 competition in the effort for the bid. I'm not going to
8 belabor this point, but I would like --

9 THE COURT: If they contest that you all compete, you
10 are entitled to prove that you can compete, and competition is
11 relevant. I mean --

12 MR. ROBERTSON: The only other thing I would note,
13 Your Honor --

14 THE COURT: So you take the view that it's relevant
15 not only for the injunction but for a determination of
16 willfulness. What, if anything, does the presence of
17 competition or not have to do with notice?

18 MR. ROBERTSON: The presence of competition for
19 notice?

20 THE COURT: That's what he was saying, I believe,
21 that he wanted a clarification whether you were offering the
22 fact of competition for notice. I'm having -- I'm not sure I
23 understand why competition, the fact of competition would be
24 pertinent to notice except that perhaps you keep track of what
25 competitors do. I don't know. Maybe there's testimony to that

1 effect.

2 MR. ROBERTSON: For example, Your Honor, Plaintiff's
3 Exhibit 316 is an email relating directly to a meeting that
4 took place between Lawson personnel, ePlus personnel for a
5 proposal to Blue Cross/Blue Shield of North Carolina, and the
6 memorandum, 468, from Mr. Lohkamp --

7 THE COURT: What does that have to do with notice,
8 though?

9 MR. ROBERTSON: Because in this memorandum from a
10 Lawson executive, he states that Lawson's competition is ePlus.
11 So he's acknowledging that he's aware of us in the marketplace
12 and that we're directly competing, and so he's on notice.

13 THE COURT: Notice of what?

14 MR. ROBERTSON: Notice of the fact that we have a
15 product out there in the marketplace.

16 THE COURT: What does that have to do with anything
17 other than the desire to injure you?

18 MR. ROBERTSON: Notice is relevant to the willfulness
19 issue, and notice is also --

20 THE COURT: Notice of what? Altogether too often,
21 lawyers use the catchword when offering something for, say, a
22 non-hearsay purpose or for other, in product liability cases,
23 they use the catchword notice, but the pertinent thing is
24 notice of what, and that's what I'm having trouble grasping.

25 MR. ROBERTSON: Notice that we were in the

1 marketplace, that would be circumstantial evidence of notice
2 they should perhaps have been aware of our patents. Often we
3 put in our RFPs that we have patented technology and list
4 those, and many of these were made available to Lawson or that
5 Lawson was receiving copies. We're informed often who our
6 competition is, and on several of these it's, indeed, Lawson.

7 THE COURT: But what evidence do you have that Lawson
8 got notice of your RFPs that said you had patents?

9 MR. ROBERTSON: Well, there's, for example,
10 Plaintiff's Exhibit 316 which said that there was actually a
11 meeting between them. There are several of these --

12 THE COURT: That shows they knew they were competing
13 for the same business, but what is it that you have that says
14 that they have notice of your patent?

15 MR. ROBERTSON: Just --

16 THE COURT: What you were saying is that often the
17 RFP or the information, the bid you submit has information in
18 it that says that you have these patents, and that's certainly
19 notice to them of the fact that -- that you have patents on
20 this technology if they got it. So I'm having trouble
21 understanding what evidence you have that contains that kind of
22 information.

23 MR. ROBERTSON: I don't have that specific evidence
24 as I sit here --

25 THE COURT: Okay. Well, don't make those points

1 then, because that doesn't help. It just distracts from the
2 main mission here.

3 MR. ROBERTSON: I understand, Your Honor.

4 THE COURT: So, anyway, you are offering this
5 evidence to show that you are competitors. Competition has to
6 do with the propriety or not of an injunction and with respect
7 to willfulness.

8 Are you intending to offer the fact that you all
9 compete as evidence of notice of some kind; if so, notice of
10 what? Because if you aren't, then the discussion is ended.

11 MR. ROBERTSON: I'll withdraw that representation,
12 Your Honor.

13 THE COURT: Then the competition evidence is not
14 being offered to prove notice of anything. So it's offered to
15 prove competition, and that being the fact, then all of the
16 exhibits are in; is that right?

17 MR. SCHULTZ: That's correct.

18 THE COURT: All right.

19 MR. SCHULTZ: Your Honor, just to clarify, there was
20 an additional objection on hearsay as to -- excuse me. 314 you
21 withdrew. Never mind.

22 THE COURT: All right, Roman numeral VIII, ePlus's
23 commercial products, notice of patented products. Okay.

24 MS. STOLL-DeBELL: Your Honor, first of all, I think
25 you sustained our objection to PX-504 which is the

1 demonstration of ePlus's software when we were discussing
2 this --

3 THE COURT: Is that the one that was referred to in
4 that motion *in limine* brief?

5 MS. STOLL-DeBELL: Yes, Your Honor.

6 THE COURT: And in the order.

7 MS. STOLL-DeBELL: Yes.

8 THE COURT: That you read from earlier?

9 MS. STOLL-DeBELL: Yes.

10 THE COURT: Do you agree that it was?

11 MS. ALBERT: Yes, we withdraw that exhibit. I can
12 also streamline this a bit. We'll withdraw PX-423, PX-424,
13 PX-425.

14 THE COURT: All right.

15 MS. STOLL-DeBELL: So the remainder of these
16 exhibits, Your Honor, are just talking about the technical
17 details of ePlus's products. We had objections to similar
18 exhibits earlier this morning. You overruled our objections,
19 and, so, you know, if you want, we can get back into it, or we
20 can just live with the same ruling.

21 MR. McDONALD: We're learning extremely slowly,
22 Judge, but we are learning.

23 THE COURT: All right, the objections to relevance
24 and 403 are overruled. What about the authenticity objections?

25 MS. ALBERT: These are all ePlus documents, and we

1 can have an ePlus witness authenticate all of them.

2 MS. STOLL-DeBELL: I think those were withdrawn
3 already anyway, Your Honor.

4 THE COURT: Okay, yes. What's the 102 and Rule 26?

5 MR. McDONALD: Are we on Roman numeral number IX,
6 Your Honor?

7 THE COURT: I'm talking about still on VIII. Is
8 there any objection to Rule 26?

9 MS. STOLL-DeBELL: No. They withdrew those exhibits,
10 Your Honor.

11 THE COURT: All right, thank you. Then the
12 objections -- I mean the -- Roman numeral IX, Lawson training
13 program, materials for customers.

14 MS. ALBERT: Your Honor, I can streamline this
15 category again. We will withdraw PX-246, PX-345, and PX-348.

16 THE COURT: 391, 393, and 404.

17 MS. STOLL-DeBELL: Your Honor, these are -- they call
18 them webinars, but they are --

19 THE COURT: Call them what?

20 MS. STOLL-DeBELL: Webinars. They are an internet --

21 THE COURT: Is that sort of like a seminar on the
22 web?

23 MS. STOLL-DeBELL: Yes, that's what it is exactly.
24 So they are recorded seminars over the web. The real issue
25 with these is they are long. PX-391 --

1 THE COURT: Which one of those rules deal with
2 length?

3 MS. STOLL-DeBELL: I think it's prejudicial and
4 cumulative, and it's unnecessary. It's Lawson demonstrating
5 its product. We're going to see other demonstrations.

6 THE COURT: Are these the same demonstrations that I
7 already ruled on?

8 MS. STOLL-DeBELL: No.

9 MS. ALBERT: Your Honor, these are highly relevant.
10 One of the issues in the case is Lawson's inducement of the
11 infringement of its customers. These are Lawson
12 representatives holding training sessions that are provided to
13 its customers. PX-391 -- we've been trying to work with Lawson
14 counsel, and we indicated that we do not intend to play the
15 entire video at trial, and we've tried to work with them --

16 THE COURT: How long are they?

17 MS. ALBERT: The PX-391 is 25 minutes, PX-393 is
18 29 minutes, and PX-404, I believe, is two hours, but, again, we
19 intend to play limited excerpts that go to specific issues
20 regarding the infringing functionality that's at issue here in
21 the case.

22 THE COURT: How long are the segments of each that
23 you propose to play?

24 MS. STOLL-DeBELL: Your Honor, I've asked --

25 THE COURT: Wait a minute. Let her answer that.

1 MS. ALBERT: I think we can probably whittle it down
2 to about ten minutes per video, and I've represented to Lawson
3 that I would identify the excerpted portion for them when we
4 reach a decision as to which particular segments we would like
5 to play, and she indicated that she would continue to work with
6 me on that.

7 THE COURT: Okay.

8 MS. ALBERT: For example --

9 THE COURT: So what are they -- is there a really a
10 hearsay objection to these things? Statement by a party. Is
11 there really -- don't you want to put that one back in the
12 barn?

13 MS. ALBERT: These are Lawson's own documents.

14 THE COURT: I'm talking to her. Don't you want to
15 put that back in the barn before I have to rule on it?

16 MS. STOLL-DeBELL: Your Honor, I just want to see
17 what they want to play so I can look at it and decide whether
18 we have objections or not.

19 THE COURT: But one of the things you can't do is
20 have a hearsay objection to your own statements.

21 MS. STOLL-DeBELL: So here's the issue with that,
22 Your Honor. These are not just Lawson customers, and you'll
23 see we have on there that hearsay objection is only to
24 customers that are talking, because it is a seminar, and there
25 are third parties, non-Lawson people, and some of these are

1 talking. So that's what our hearsay objection is to, and until
2 I can see what portions they want to play, I don't know if
3 there's customers talking or not. If it's just Lawson people
4 talking, I don't have a hearsay objection to that.

5 THE COURT: Okay. So, now, how long will it take you
6 to get down to ten minutes per video?

7 MS. ALBERT: I can probably do that by the end of the
8 week.

9 THE COURT: Do that, and then you talk with each
10 other and see what you come up with and we'll see what's left.

11 MS. ALBERT: PX-391 and 393 do not have any
12 third-party statements on them whatsoever. They are only the
13 Lawson presenters.

14 PX-404, it does have limited questions that were
15 raised by customers, but then the Lawson trainer answers the
16 questions. Those questions aren't being offered for the truth
17 of the matter asserted. The answer to the question on the part
18 of the Lawson trainer is an admission by a party opponent, so
19 that would not be hearsay.

20 THE COURT: It may or may not be an admission. It
21 may also just be a statement by somebody authorized to make the
22 statement, and if that's the case, it may not even be hearsay.
23 So the hearsay objections to those three are all overruled, and
24 901, do you really have any authenticity objections?

25 MS. STOLL-DeBELL: I don't think so.

1 THE COURT: I don't think so either. You better
2 not -- you don't think she's going out there and --

3 MS. STOLL-DeBELL: No.

4 THE COURT: Okay, they are withdrawn. What is the
5 end of the week? What day is that?

6 MS. ALBERT: Friday. I mean --

7 THE COURT: Yep, it sure is. Or Saturday. You never
8 know.

9 MS. ALBERT: I think it's October 1st.

10 THE COURT: So you're going to give it to them by
11 October 1st.

12 MR. McDONALD: We will stipulate that Friday is the
13 end of the business week.

14 THE COURT: That's a start somewhere. We've got
15 something agreed to, but I know it's a qualified stipulation,
16 because you said the end of the business week. You didn't say
17 week. All right, when are you going to tell them if you have
18 any objections if they give them to you by Friday?

19 MS. STOLL-DeBELL: Can I have a week which is
20 October 8th?

21 THE COURT: Okay. So Exhibits 246, 345, and 348 are
22 withdrawn. On 391, 393, and 404, you're going to whittle them
23 down to about ten minutes or so, notify her of the excerpts on
24 the 1st of October. You're going to notify her of any
25 objections on the 8th of October, and you're going to work them

1 out. Okay? Everybody is shaking their head yes.

2 Ten, contract documents between Lawson and its
3 customers.

4 MS. STOLL-DeBELL: So, Your Honor, I would actually
5 put -- I categorize these slightly differently. I had a
6 category for documents relating to products they have not
7 accused of infringement. PX-253 relates to that. It relates
8 to this LSF or System Foundation, and then on the next page as
9 part of category 11, PX-455, 456, and 506 relate to both System
10 Foundation, something called Smart Office and ProcessFlow 9.

11 THE COURT: Why are we having evidence on things that
12 aren't accused of infringement?

13 MR. ROBERTSON: They are accused, Your Honor, and
14 you've already ruled on this. This was Lawson's motion *in*
15 *limine* that you said was denied as moot and you needed to hear
16 the evidence. This has to do with all the same functionality
17 they are talking about.

18 The witnesses will say that Lawson System Foundation
19 is sold with the infringing system, is necessary to the
20 infringing system, and can't operate without it. It is part
21 and parcel of the infringing system. They just want it out of
22 the case. Your Honor ruled on this.

23 THE COURT: Why would it be denied as moot as opposed
24 to being denied without prejudice to dealing with it?

25 MR. ROBERTSON: Well, it was denied as moot because

1 you said in open court that you needed to hear the evidence.

2 THE COURT: I know, but why would I have said it is
3 moot? It's certainly not moot.

4 MR. ROBERTSON: I am sorry, sir. I'm informed now
5 that it was denied without prejudice.

6 THE COURT: Okay. Well, I understand that. Is that
7 the same issue that we're talking about?

8 MS. STOLL-DeBELL: Yes, Your Honor, and we were
9 talking about the SKUs. It came up in the context of that,
10 which products were accused because they were trying to include
11 some SKUs in their damages case relating to System Foundation
12 and ProcessFlow, and you asked Mr. Strapp to show you where in
13 Dr. Weaver's report does he accuse System Foundation or
14 ProcessFlow of infringement, and he pointed to that footnote,
15 and I've got a copy of the report here I can show you. But Dr.
16 Weaver mentions it in a single footnote and says the accused
17 products run on that platform, but the platform itself doesn't
18 make the fact of infringement more or less probable. It's the
19 same as saying it runs on a computer or you need a monitor to
20 see it. Yes, the products run on it, but it doesn't impact
21 infringement either way.

22 It wasn't in Dr. -- they didn't do an analysis of
23 those products, System Foundation or ProcessFlow, against the
24 claims. He says, look, it runs on this platform. The accused
25 product, S3, runs on this platform, and as far as Smart Office,

1 it's a user interface that you can use to view the accused
2 products. Dr. Weaver doesn't mention Smart Office at all.

3 Their other expert, Mr. Niemeyer, he has one sentence
4 about each of these things in his report, and I have that, and
5 I can show you as well.

6 THE COURT: That could be a big thing depending on
7 what the one sentence says.

8 MS. STOLL-DeBELL: It says Smart Office is a user
9 interface that can be used to view the accused products. You
10 don't need to use it. Just makes it look a little bit
11 different.

12 THE COURT: Why are these accused products -- I have
13 to tell you, I didn't go back and review all the *motions in*
14 *limine* in preparation for today as you all did, obviously, and
15 the rulings, but didn't this come up in respect of a damage
16 issue? And isn't that what I ruled on, and didn't it have to
17 do with the convoyed sales and -- I've lost the other term that
18 relates to the damages. What do you call it?

19 MR. ROBERTSON: It was argued by --

20 THE COURT: What's that term?

21 MR. ROBERTSON: Entire market value.

22 THE COURT: Entire market value, thank you very much.
23 Entire market value rule, and isn't that -- that issue is out
24 of the case now with the damages, isn't it?

25 MR. ROBERTSON: In our view, Your Honor, that was

1 never an issue. That is how it was argued to Your Honor, but
2 we never argued that the Lawson Software Foundation was an
3 entire market value or convoyed sale or anything of the sort.
4 We never argued that selling the procurement, the S3
5 procurement software drives sales of the LSF. What we always
6 argued is you needed the LSF, you have to have the LSF to make
7 the infringing system.

8 THE COURT: Okay, now, to make the system -- you have
9 to have a computer to run the system. Does the computer
10 infringe?

11 MR. ROBERTSON: Well, it's part of the infringing
12 system when they implement the system.

13 THE COURT: So they can't use a computer? What am I
14 going to do; enjoin them against using a computer?

15 MR. ROBERTSON: Enjoin the use of the infringing
16 system on a computer. That's --

17 THE COURT: They can still take the same computer and
18 go out and use it as a word processor and go check Google and
19 do all that stuff.

20 MR. ROBERTSON: They can do that, but they can't run
21 the procurement system without LSF or the ProcessFlow or any of
22 the things they're trying to take out now. They can't run the
23 infringing system, and that's what their witnesses will testify
24 to if you will allow them to.

25 THE COURT: Does your man say that they infringe?

1 MR. ROBERTSON: Yes.

2 THE COURT: Who?

3 MR. ROBERTSON: Dr. Weaver.

4 THE COURT: Can I see his testimony?

5 MS. STOLL-DeBELL: May I hand it up, Your Honor? I
6 have both Dr. Weaver's expert and Mr. Niemeyer's, and I folded
7 them back so you can see what pages.

8 THE COURT: Thank you.

9 MR. ROBERTSON: Your Honor, Dr. Weaver also relies on
10 the numerous documents related to LSF saying --

11 THE COURT: Wait a minute. Let's take one thing at a
12 time. Show me where in the report he says that.

13 Now, I have Dr. Weaver's -- I have Niemeyer's in
14 front of me. I'll go to Weaver's. Is that what you want me to
15 do? We have Weaver on page -- what is it, 15?

16 MS. STOLL-DeBELL: I believe page 15, footnote one.

17 THE COURT: It says, "Lawson System Foundation and
18 ProcessFlow 9 prerequisite modules that must be licensed with
19 modules for any of the above four deployment scenarios," citing
20 some depositions.

21 It says, "Lawson's System Foundation is the technical
22 foundation required to run Lawson S3 applications. Lawson
23 ProcessFlow is included within Lawson Business Process
24 Management, another component of the required Lawson platform."
25 Is that the opinion that says that Lawson System Foundation and

1 ProcessFlow 9 infringe?

2 MR. ROBERTSON: It's in every claim he did an
3 analysis on, Your Honor.

4 THE COURT: What's in every claim?

5 MR. ROBERTSON: The opinion that Lawson Software
6 Foundation is necessary, part and parcel, is required to have
7 an infringing system. He cites to the deposition testimony of
8 numerous Lawson witnesses who say, so -- "Question: So you
9 need the licensed Lawson System Foundation in order to use any
10 of the applications that we've been talking about today," which
11 were the procurement applications plus other applications.

12 "Yes.

13 Version nine.

14 Above.

15 Yes.

16 There's a separate license fee associated with this
17 Lawson System Foundation?

18 Yes. Cited in Weaver report."

19 The Hager deposition transcript, "LSF is the platform
20 on which both M3 and S3 run."

21 Those are the systems cited in --

22 THE COURT: Why does that make them infringing as
23 themselves?

24 MR. ROBERTSON: The system has to perform, for
25 example, the steps of the patent or it has to have the

1 architecture in order to do what the apparatus claim said. The
2 Lawson Software Foundation is a necessary part of that
3 architecture. That's what the witness said. You can't run it
4 without that foundation --

5 THE COURT: That doesn't mean that it infringes.

6 MR. ROBERTSON: It does mean when it completes and
7 makes a fully operational system. That is --

8 THE COURT: I'm not following your statement. Show
9 me where Weaver says that the Lawson System Foundation and
10 ProcessFlow 9 infringed a claim of the patent and how.

11 MR. ROBERTSON: Your Honor, what he's saying
12 repeatedly, and I don't know if we have the Weaver report here,
13 but -- excerpts, I think, but what he's saying is you can't
14 have a Lawson System Foundation, you can't have an operational
15 system without the Lawson System Foundation and the ProcessFlow
16 9. You need to have them as part of the modules that build an
17 operational system.

18 THE COURT: I have software. The software infringes.
19 The whole software infringes. In order to be able to run the
20 software, I have to have a computer. The computer doesn't
21 infringe the patent. It just helps, it makes useful my
22 product, the product that -- helps me use the product that does
23 infringe.

24 MR. ROBERTSON: Your Honor, I respectfully challenge
25 the premise. When you put -- the software alone sitting there

1 doesn't do anything with respect to, say, for perhaps
2 performing the steps of the method claims. The software
3 sitting there alone doesn't make a fully functional apparatus.
4 It might as well be a doorstop or a paperweight.

5 When you put it on a computer and it's operating,
6 that is an implementation of an infringing system, and when the
7 infringing system requires a foundational software for it to
8 perform, that's also a part of the infringing system.

9 These things come in many separate models, Your
10 Honor, and are put together, and when they are put together,
11 they form infringing systems. You will see various ways that
12 they can put together these modules to come up with an
13 implementation that either constitutes an infringing system or
14 then can perform the steps of --

15 THE COURT: Do you have a case that holds what you
16 are saying?

17 MR. ROBERTSON: I'm sure I can find one.

18 THE COURT: You better find one, because -- and you
19 better give it to me. You better brief that issue on the same
20 schedule you brief any other ones. You start off on
21 October 8th, or --

22 MS. STOLL-DeBELL: I would note also that this System
23 Foundation, ProcessFlow are used with things that don't relate
24 to the accused software at all. So it is just like a computer.
25 Like our human resources software runs on System Foundation.

1 It is just like the computer. It's something that is needed to
2 run the accused software, but that doesn't mean it infringes
3 it, and it doesn't mean that we even need to get into it at
4 trial.

5 If it was so important, Mr. Niemeyer would have
6 explained something more than one little sentence in there. If
7 it was so important, Dr. Weaver would have said more than you
8 need it to run the software --

9 THE COURT: I have to agree with you. I'm baffled by
10 this. You're going to have to brief and show me how -- A,
11 you're going to have to show me the case law that says you can
12 do what you're trying to do, and, B, you have to show me in
13 Weaver's and Niemeyer's report where they say that, because all
14 I see is one sentence.

15 MR. ROBERTSON: I will do that, Your Honor. Mr.
16 Niemeyer remembers just looking at source code, didn't talk
17 about infringement, didn't talk about claims. That's why his
18 report was fairly focused.

19 Let me just say one other thing, though. I'd agree
20 with Ms. Stoll-DeBell that when the Lawson Software Foundation
21 is being used with some other modules to make that system
22 operate, it's not an infringement, but when it's being used to
23 make the procurement system operate, that is an infringing
24 system.

25 So we don't accuse it standing alone, or we don't

1 accuse it when it's being used to perform some other software
2 function such as financial accounting or human resources or
3 that. We don't say that's an infringing system. We never
4 claimed damages for it when it's on a system that doesn't
5 involve this procurement functionality.

6 THE COURT: Let's play this out and assume you are
7 right. Assume you prove that there's infringement of the other
8 things that are charged as infringing. I issue an injunction
9 against using those. I do not issue an injunction against the
10 Lawson platform, Lawson System Foundation and ProcessFlow.
11 They can use that to do anything else.

12 MR. ROBERTSON: I would agree with that. I would not
13 ask for an injunction that would ask to enjoin Lawson Software
14 Foundation, for example, when it's being used with financial
15 accounting.

16 THE COURT: How would I enjoin it when it is being
17 used with anything else that's infringed? As long as I say you
18 can't use the infringing product, period, it doesn't make any
19 difference whether you use it with a hamburger patty or a
20 George Foreman grill or a computer or these foundations, does
21 it? If you use it, you are, in fact, violating the injunction;
22 isn't that right?

23 MR. ROBERTSON: No, in this sense, Your Honor,
24 because it's not an infringing apparatus or it's not performing
25 the steps of the method claim without being able to access and

1 utilize the foundation. You can't build a house without a
2 foundation, and once you do, the house is a complete house.
3 That's what's going on here.

4 So we would not ask to enjoin Lawson System
5 Foundation when it's being used with something that doesn't
6 create an entire infringing system. It's like putting together
7 a house. You need that foundation, otherwise the house can't
8 stand up. But if the foundation were used to build something
9 else and the patent covered houses that could be utilized by
10 people, that is a use in an infringing system.

11 THE COURT: I don't envision any circumstance in
12 which I would enjoin the Lawson System Foundation and
13 ProcessFlow 9 at all. I would enjoin the use of anything that
14 infringes, and if they used it on that process, of course it
15 would be an infringement, but it wouldn't make any difference
16 if they used it on some other process. It would still be an
17 infringement and a violation -- a violation of the injunction
18 in either case.

19 I do not understand your position, and you have to
20 show me a case that says you are right, because I don't think
21 you're right, and I don't see the facts in Weaver's report.
22 I've read Weaver's report. I see one footnote that deals with
23 it, but that's all that's been cited to me. Maybe there's
24 something else. You say you don't have the report with you, so
25 brief it, and brief it on the same schedule that the others

1 were briefed on, only this time you go first and last; okay?

2 MR. ROBERTSON: All right, thank you, Your Honor.

3 THE COURT: Can you give that back to Ms.

4 Stoll-DeBell. So Roman numeral X is briefing; right?

5 MR. ROBERTSON: There is this Plaintiff's
6 Exhibit 501.

7 THE COURT: Say again.

8 MR. ROBERTSON: Plaintiff's Exhibit 501 which is also
9 under this category --

10 THE COURT: We were discussing only 253, weren't we?

11 MR. SCHULTZ: Your Honor, with respect to 501, we're
12 withdrawing that objection.

13 THE COURT: All right, objection withdrawn.

14 MR. ROBERTSON: We'll represent, this was like the
15 RFP documents. It is a multiple, voluminous document. We've
16 compiled it together. I will do the same thing I represented
17 I'd do with respect to the multiple RFPs, and we may be
18 submitting for consideration an FRE 1006 summary just so this
19 voluminous document does not have to go before the jury.

20 THE COURT: What now? You're going to submit another
21 objection -- I mean another exhibit?

22 MR. ROBERTSON: It's just --

23 THE COURT: Is that what you said?

24 MR. ROBERTSON: It's just a summary compilation, Your
25 Honor, of this voluminous exhibit.

1 THE COURT: You knew that before you did your
2 exhibits. So why didn't you submit a 1006 summary beforehand?
3 Do you object to him submitting a 1006 summary at this stage?

4 MR. SCHULTZ: We do.

5 THE COURT: Surprise.

6 MR. SCHULTZ: We think it's cumulative. If he wants
7 to get in the evidence, he can go through individually on each
8 of the statements at work.

9 MR. ROBERTSON: Your Honor, I didn't do one. It was
10 an oversight on my part. I apologize. I thought it would be
11 helpful to summarize for ease of the jury's view and for moving
12 this trial along, but I won't represent to you that I didn't
13 have an opportunity to do it. I just overlooked it, and that's
14 what it says.

15 THE COURT: Do you want expiation for your sins?

16 MR. ROBERTSON: No, thank you, Your Honor. They are
17 too numerous to name.

18 THE COURT: I was just talking about that one. It
19 probably would help the jury to have it, don't you think?
20 Wouldn't it make it easier for you to cross-examine?

21 MR. SCHULTZ: We'll take a look at it.

22 THE COURT: Why don't you all see if you can work it
23 out, because I think probably it will facilitate what you want
24 to do with it and probably will make it easier for everybody to
25 understand. So I'd take a look at doing a 1006 summary of it

1 if I were you all and see if you can do it.

2 All right, this brings us to number 11. Documents
3 relating to functionality of Lawson's software/infringement.
4 Why wouldn't they come in? I understand there may be some
5 hearsay objection, but I don't understand why they are not
6 relevant.

7 MS. STOLL-DeBELL: So the last three, Your Honor, are
8 the ones we just talked about that they're going to brief, 455,
9 456, and 506.

10 THE COURT: Yes, but we were briefing on another
11 subject.

12 MS. STOLL-DeBELL: I'm not sure why they -- I think
13 those relate to those non-accused products, Smart Office.

14 THE COURT: Your objection to relevance is that
15 they're not accused.

16 MS. STOLL-DeBELL: That's right.

17 THE COURT: Same issue.

18 MS. STOLL-DeBELL: Seems like we already covered
19 that, and we don't need to go over that again.

20 THE COURT: So that's the same issue as to be
21 briefed; right?

22 MS. STOLL-DeBELL: Yes. Then 342, these are not
23 Lawson documents.

24 THE COURT: 342, okay, that's a software newsletter.
25 Who is IDII?

1 MS. STOLL-DeBELL: I have no idea.

2 THE COURT: Including an article on Lawson
3 e-procurement for health care.

4 MR. ROBERTSON: Your Honor, let me help out here.
5 These are cited by Dr. Weaver in his report. They don't have
6 to come into evidence, but he does rely on them, and he can
7 rely on hearsay, so we can withdraw them as an exhibit --

8 THE COURT: As long as they are of the kind that a
9 person in his discipline usually relies upon, he can rely upon,
10 but they don't come into evidence. So the exhibits are
11 withdrawn; right? 342 and 343; is that right?

12 MR. ROBERTSON: Yes, sir.

13 THE COURT: Okay. You do agree, don't you, that he
14 can rely on them if they're of the type that people in his
15 discipline can rely on but that they don't come into evidence?
16 Do you agree with that, Ms. Stoll-DeBell?

17 MS. STOLL-DeBELL: Yes.

18 MR. SCHULTZ: 437, Your Honor, is a document that was
19 not produced by ePlus in discovery, and it does not
20 specifically relate to any of the products that are accused of
21 infringement. It is a Lawson website printout.

22 THE COURT: Why would they be producing your
23 documents?

24 MR. SCHULTZ: They went onto the website and printed
25 it out.

1 THE COURT: You didn't print it out, either.

2 MR. SCHULTZ: Because it's not relevant.

3 THE COURT: I think the fact that you didn't produce
4 it is sort of an objection that doesn't make much difference
5 one way or the other except that it doesn't fall within your
6 stipulation on authentication.

7 MR. ROBERTSON: I'll withdraw it, Your Honor.

8 THE COURT: Okay. Exhibit withdrawn. All right, 12,
9 miscellaneous.

10 MS. STOLL-DeBELL: We're withdrawing our objections
11 to both of these.

12 THE COURT: Objection is withdrawn. 13, rebuttals to
13 Lawson's invalidity contentions. Before we do this, you need
14 to get back to the topic that we left unaddressed, the PTO
15 reexamination evidence that relates to willfulness you said.

16 MR. McDONALD: Right.

17 THE COURT: We need to go back to that. I need to
18 assess that because I didn't do it. We got off on another
19 topic. Then I think we went to lunch.

20 Okay, rebuttals to Lawson's invalidity contentions.
21 There are 420, 421, 422, and 505. Let's take the easy one, the
22 declaration of Ross Dworkin. How does an affidavit come into
23 evidence?

24 MR. ROBERTSON: Your Honor, we'll -- that was relied
25 on by our expert on invalidity. Mr. Dworkin was an inventor in

1 one of the prior art patents. Several years ago he gave a
2 declaration about the functionality of what was disclosed in
3 his patent and how the system operated.

4 Our expert relies on it when they attempt to combine
5 Mr. Dworkin's patent with some other references so it doesn't
6 come into evidence, but we believe it is cited in the report,
7 and it will be of the type that an expert would rely on.

8 THE COURT: Why would an expert -- what is -- what
9 kind of proof do you have that says that experts rely on
10 affidavits given in litigation? What kind of proof is that
11 other than he did it?

12 MR. ROBERTSON: Well, I believe he also talked to Mr.
13 Dworkin, and he can understand because there's a question of
14 whether you would combine the Dworkin patent with the other
15 patents they want to combine it, and he's going to say, no,
16 that wouldn't render the patents obvious or invalid, and that
17 is certainly information that he can then look at and say the
18 functionality --

19 THE COURT: Who is the "he"? Two people involved.
20 I'm not sure who the inventor --

21 MR. ROBERTSON: Mr. Hilliard, sorry, our validity
22 expert.

23 THE COURT: What about Dworkin? In other words, I
24 guess the bottom line is, I'm unaware of what record you have
25 made or can make that shows that an affidavit is something of

1 the kind that an expert usually relies upon in his practice of
2 his profession. I've never seen that done, but there's lots I
3 haven't seen, so what have you done to establish that?

4 MR. ROBERTSON: Experts can rely on testimony, Your
5 Honor, for example, and review a transcript.

6 THE COURT: Yes, testimony where somebody is
7 represented and cross-examination obtains. I'm unaware of
8 experts relying on affidavits, but maybe they are.

9 MR. ROBERTSON: I'll see if I can find the citation
10 for you, Your Honor, but I don't think it's been unusual, and
11 the experts testified about the Dworkin declaration. That's
12 been part of his report in the past two trials, so I didn't
13 know this was going to be an issue.

14 THE COURT: They made it an issue.

15 MR. ROBERTSON: I did know I wanted to withdraw the
16 exhibit.

17 THE COURT: All right, the exhibit is withdrawn.
18 That leaves us with 420, -21, and -22. You're going to
19 withdraw your objections and move right on, or what?

20 MS. STOLL-DeBELL: No, Your Honor, not to these.

21 THE COURT: Oh, they must be hot tickets.

22 MS. STOLL-DeBELL: These are -- I think they're
23 printouts from the USPTO's website. I think two of them are
24 dated 2010. What they want to use these for, I think, is to
25 show that the Patent Office examiner actually found the '989

1 patent as part of his search results when he was prosecuting
2 the application at issue. That's the '683 patent. But these
3 documents just don't show it.

4 They have the classes and subclasses of the
5 examiner's search, and the '989 patent as issued by the Patent
6 Office is not classified in those classes, and I have a
7 certified copy of that patent here I can show you, Your Honor.
8 It is a different class, and so what they've done is they've
9 gone back and said, well, the PTO abolished the class the '989
10 patent was in, and they moved it into another class, and
11 they're going to try to use these website printouts to show
12 that, but the fact of the matter is when the '989 patent
13 issued, it had this other class, and they've got nothing to
14 show how and when, if the Patent Office even reclassified it at
15 all. They've got no witness and nobody to lay a foundation for
16 these documents. They are hearsay.

17 THE COURT: But you didn't object on the basis of
18 hearsay.

19 MS. STOLL-DeBELL: Actually I did, Your Honor, but I
20 think with as many exhibits as there are --

21 THE COURT: They just dropped --

22 MS. STOLL-DeBELL: There were mistakes, frankly, in
23 the appendices that we filed.

24 THE COURT: Okay.

25 MS. STOLL-DeBELL: So we have always said that these

1 are hearsay and they can't be authenticated, they've got no
2 witness, they can't prove that the patent was in the class they
3 say it was in, and especially since the certified copy from the
4 Patent Office puts it in a different class.

5 THE COURT: Do you agree they made a hearsay
6 objection and it got dropped in the typing of one of these
7 appendices?

8 MS. ALBERT: No, Your Honor. I believe we have a
9 specific email from Lawson counsel that they are withdrawing
10 the hearsay objection because these actually are not hearsay
11 because they are governmental publications that come in under
12 an exception to the hearsay rule.

13 THE COURT: Then they are hearsay, but they are
14 covered by an exception.

15 MS. ALBERT: Exactly.

16 THE COURT: She says, Mrs. Stoll-DeBell, you all
17 dropped the hearsay objection. Did you drop the hearsay
18 objection? I understand as much paper as you all are dealing
19 with, people are going to make mistakes, and if you dropped it
20 and that was an error when you said it, that's okay. Just tell
21 me. Did you drop it or not?

22 MS. STOLL-DeBELL: I don't think I did, but Mr.
23 McDonald thinks I should.

24 MR. McDONALD: We're going to drop it now.

25 MS. STOLL-DeBELL: I'm dropping it now, Your Honor.

1 Whether I did or not before...

2 THE COURT: Pay attention to her, Mr. McDonald. She
3 knows what she's doing over there.

4 Anyway, I'll take that out. Now, so the issue is
5 relevance and authentication.

6 MS. ALBERT: I think for authenticity, also under
7 902(5), they are official publications of government agencies,
8 so extrinsic evidence of authenticity is not required.

9 THE COURT: What do you say?

10 MS. STOLL-DeBELL: Well, I don't think they are
11 official publications. I think the official publication is a
12 certified copy of the '989 patent which shows the class was
13 class 325 which is the opposite of what they're trying to
14 prove.

15 THE COURT: Okay. Help me -- go back to square one
16 here. Let me get the documents. You all are trying to prove
17 what with these documents?

18 MS. ALBERT: Well, Lawson has an invalidity defense
19 relating to the inventors' '989 patent. They claim that patent
20 anticipates and/or renders obvious some of the claims.

21 They also contend that the examiner of the
22 patents-in-suit, when he was examining the patent applications,
23 was not aware of the '989 patent, and these documents are
24 official records of the Patent Office that show that the
25 classification in which the '989 patent was originally

1 classified was changed to class 705, and PX-422 --

2 THE COURT: When?

3 MS. ALBERT: It was during the pendency of the
4 applications for the patents-in-suit.

5 THE COURT: Let's go back. How do they know what the
6 patent examiner found in the first instance?

7 MS. ALBERT: Because in the prosecution file
8 histories for the patents-in-suit that have been stipulated,
9 there are search notes at the back of the examiner's file
10 history that shows which classifications the examiner
11 searched --

12 THE COURT: So he searched the classifications by
13 number.

14 MS. ALBERT: Right.

15 THE COURT: And what he didn't find was the '989; is
16 that right?

17 MS. ALBERT: Not quite. He searched class 705 two
18 times after the '989 patent issued, and the '989 patent is
19 currently classified in class 705 which is shown by PX-422.
20 That's the '989 patent. The current class that it's in is
21 class 705, and the examiner searched that class twice after the
22 '989 patent issued.

23 Under federal circuit law, *Polaroid Corporation v.*
24 *Eastman Kodak*, 787 F.2d 1556, that's a federal circuit case
25 from 1986, that case stands for the proposition that under the

1 law, the examiner is presumed to have considered every patent
2 that is contained in a classification that the examiner
3 searched. And this federal circuit law is also codified in the
4 *Manual of Patent Examining Procedure* at section 717.05.

5 So our point is, by these exhibits, that the examiner
6 did, in fact, search the art unit where the '989 patent can be
7 found, and under the law, the examiner is presumed to have
8 considered the '989 patent by virtue of searching the
9 classification where the '989 patent is found.

10 MS. STOLL-DeBELL: May I hand up a certified copy of
11 the '989 patent, Your Honor?

12 THE COURT: I have to tell you, this is one of the
13 silliest rules I have ever heard of. Presumed to be perfect in
14 a world where -- what percent of the reexaminations are
15 granted?

16 MS. ALBERT: Over 95 percent.

17 THE COURT: 95 percent, and we have a 1986 case
18 presuming perfection, and we have proof today that 95 percent
19 of the patents reexamined are found to be invalid?

20 MS. ALBERT: I don't think that's the case, Your
21 Honor. I think 95 percent of requests for reexamination are
22 granted.

23 THE COURT: Well, that's true. You're right. Okay,
24 I've got a certified copy of the '989 patent. Now, what about
25 it?

1 MS. STOLL-DeBELL: It shows it was issued in class
2 305 which is many months after they say that class was
3 abolished, and the point here is they have no evidence to show,
4 and they can't --

5 THE COURT: Where is the class 305? Where does it
6 say that?

7 MS. STOLL-DeBELL: I highlighted it in pink for Your
8 Honor on the second page. It says class three, U.S. class,
9 line 52 on the cover page of the patent.

10 THE COURT: I don't see it. It says 395, 228.

11 MS. STOLL-DeBELL: Exactly.

12 THE COURT: I thought you said 305.

13 MS. STOLL-DeBELL: I'm sorry. I misspoke.

14 THE COURT: I may have misheard. U.S. class 395/228,
15 and then he did these others, but among them was not the 705;
16 is that right?

17 MS. ALBERT: Well, that's the whole point of PX-422,
18 that after --

19 THE COURT: Wait a minute. Is that right? 705 is
20 not in here.

21 MS. ALBERT: It's right that on the certified copy
22 705 is not on there. That is the point of offering PX-422,
23 because the classifications in the Patent Office changed, and
24 that class became class 705.

25 THE COURT: Yes, but when did that happen?

1 MS. ALBERT: It happened in 1997, and so now --

2 THE COURT: And this patent issued in 1998?

3 MR. McDONALD: That's right.

4 THE COURT: Why isn't this presumptive evidence? Why
5 isn't the certified copy presumptive evidence that he didn't
6 search 705? I think it shows that he didn't do 705.

7 MS. ALBERT: The class changed in '97. The examiner
8 searched, and class 395 became class 705. It was just a number
9 change within the Patent Office. I'm not sure why the printed
10 copy of the '989 still has the old classification on it.
11 That's why I would like to introduce the one, the current one
12 from the Patent Office website that actually shows that it is
13 in class 705.

14 THE COURT: I think that evidence is speculative and
15 prejudicial and goes against the grain of an official document
16 issued by the United States Patent Office and that just
17 offering the document could not possibly do anything but create
18 prejudice and confusion, and the only way that could ever come
19 in is if somebody came here to testify about it all. I
20 understand the point for which it's being offered, but the mode
21 for which that is being proved can't fly. So I sustain the
22 objection to 420 and -21.

23 MS. STOLL-DeBELL: And -22.

24 THE COURT: And -22. Okay.

25 MS. STOLL-DeBELL: Okay, Your Honor, the next group

1 of documents is group 14. These are all of Lawson's revenue
2 spreadsheets, and they are huge, so I don't think we need to
3 pull them up. These are the damages documents that they
4 decided they don't want to withdraw, and they say they're
5 obviously not relevant to damages anymore, but now they say
6 they are relevant to commercial success.

7 THE COURT: Of what?

8 MS. STOLL-DeBELL: I guess they're now saying for the
9 first time that Lawson's product shows commercial success. We
10 asked a specific interrogatory, and we said, tell us what
11 products you are going to use to show commercial success. They
12 listed -- they did not list Lawson's. It's interrogatory
13 number eight, and I have a copy for you if you'd like to see
14 that.

15 THE COURT: Let me see that. Number what, Ms.
16 Stoll-DeBell?

17 MS. STOLL-DeBELL: I believe it's number eight.

18 THE COURT: Interrogatory eight?

19 MS. STOLL-DeBELL: Yes.

20 THE COURT: "Identify any commercial products that
21 you intend to rely upon to support an assertion of commercial
22 success of the invention allegedly disclosed in the
23 patents-in-suit and any facts or documents that you contend
24 evidence the nexus between the alleged success and the
25 invention disclosed in the patents-in-suit, and identify the

1 person most knowledgeable about the nexus as well as the volume
2 sales and revenues of any such commercial product." There's a
3 bunch of objections and then the answer.

4 MS. STOLL-DeBELL: Right, and in their answer, they
5 identify their own products. They identify Ariba and SAP. I
6 think that might be it, but they certainly don't say Lawson's
7 products show commercial success.

8 THE COURT: It says, "The patentee's patented
9 products, SupplyLink, Cornerstone, ProcureNet, Content Plus,
10 Procure Plus, Catalog Plus, and Supplier Portal have all
11 achieved industry recognition and commercial success.
12 Moreover, licensees of the patents-in-suit, Ariba and SAP, have
13 also marketed and sold products practicing the patented
14 inventions which products have achieved commercial success.
15 These products include," and they list Ariba products and SAP
16 products. Then they talk about various experts talking about
17 what they're going to talk about.

18 Now, was there any --

19 MS. STOLL-DeBELL: They are supplemented twice, Your
20 Honor, but those are both included on that page for you.

21 THE COURT: So there is no supplement to it. Your
22 position is -- here you've objected as irrelevant, and under
23 403 all the way down, 1006 for most of them, and then motion *in*
24 *limine* on all of them, and then MD on one of them, and I don't
25 see any objection based on Rule 37.

1 MS. STOLL-DeBELL: Well, Your Honor, let me just say
2 that these documents were going to be used for damages, and
3 that changed dramatically two weeks ago. Since then, we've
4 been negotiating back and forth trying to resolve some of these
5 issues, and it became clear to me for the first time that they
6 were going to say that Lawson's sales showed commercial
7 success.

8 So that's why, Your Honor. And I went back, because
9 it was -- I had never heard that before, and I went back and
10 looked, and they didn't tell us they were going to do that
11 until now. These are huge amounts of documents. Damages are
12 out of the case. They didn't tell us they were going to do
13 that, and even if they had, they still need to show a nexus
14 that the sales of Lawson were related to our use of the
15 patented feature, not just that we sold a lot of stuff.

16 So I don't think they can meet the first hurdle
17 because they didn't disclose it, and they should be precluded
18 under Rule 37. But even if they had, I don't think they have
19 enough to prove what they need to prove for secondary
20 considerations.

21 THE COURT: All right.

22 MR. STRAPP: Your Honor, first with respect to this
23 newly asserted Rule 26/Rule 37 objection which we had never
24 heard before we stepped into court today, we answered another
25 interrogatory. There was an all-inclusive interrogatory that

1 Lawson propounded, and I have a copy I can hand up to Your
2 Honor.

3 THE COURT: I have their interrogatories here. What
4 are they?

5 MR. STRAPP: It's interrogatory number six.

6 THE COURT: That Lawson propounded or you propounded?

7 MR. STRAPP: Excuse me, that Lawson propounded to
8 ePlus.

9 THE COURT: I've got second supplemental answers, and
10 interrogatory number six, is that what you want?

11 MR. STRAPP: Yes. Interrogatory number six asks for
12 all facts to identify things and testimony that you contend
13 constitute objective evidence of nonobviousness. The corrected
14 answer to interrogatory number six is several pages long.

15 THE COURT: I have a supplemental answer. Is that
16 what you are talking about? I don't see any corrected answer.

17 MR. STRAPP: Can I hand up a copy?

18 THE COURT: Maybe I ought to go back. I've got the
19 corrected answer. It begins on page ten?

20 MR. STRAPP: Yes.

21 THE COURT: Where do you mention Lawson's products in
22 there?

23 MR. STRAPP: We mentioned Lawson's products in a
24 couple of places. If you turn to page 15, the paragraph that
25 begins "moreover" at the top of the page.

1 THE COURT: Okay. Where does it say that?

2 MR. STRAPP: Says, "Moreover, the patented inventions
3 have been commercially successful. The commercial success of
4 the patented inventions may be demonstrated by the commercial
5 success of the patentee's products as well as through the
6 commercial success of infringers' infringing activities and
7 licensees' activities."

8 We also make reference on page 13, the last full
9 paragraph, or the paragraph that begins in E mentioned that --

10 THE COURT: Just a minute. Let me get there. All
11 right.

12 MR. STRAPP: States, "Indeed, Lawson has recognized
13 benefits achieved by automating e-procurement process as
14 claimed in the patented invention." And if I could also direct
15 Your Honor back to interrogatory number eight --

16 THE COURT: Just a minute, I'm trying to look. The
17 question I was asking, interrogatory number six, that deals
18 with nonobviousness.

19 MR. STRAPP: Right. That's the reason for which we
20 want to offer these particular exhibits that we're discussing.

21 THE COURT: Number eight deals with commercial
22 success.

23 MR. STRAPP: Commercial success is one of several
24 secondary considerations that go to nonobviousness.

25 THE COURT: Yes, but when you ask the specific one,

1 that's the one that counts.

2 MR. STRAPP: The other point I wanted to make, Your
3 Honor, directly to the issue you are addressing in
4 interrogatory eight, at two places we incorporate by reference
5 and refer to the answer to interrogatory number six, that's
6 both at the beginning of the answer to interrogatory number
7 eight and at the end of the answer to interrogatory number
8 eight.

9 And a second point is that in the second supplemental
10 answer to interrogatory number eight, ePlus incorporates by
11 reference its rebuttal expert report on validity. That was a
12 report done by its expert, Brooks Hilliard, who mentions the
13 commercial success of Lawson's infringing activities and
14 specifically products that have been sold that ePlus accuses of
15 infringement. I also wanted to address the nexus issue.

16 THE COURT: Why does their success show anything?

17 MR. STRAPP: Well, Your Honor --

18 THE COURT: Unless you prove infringement.

19 MR. STRAPP: I do agree that if we do not prove
20 infringement, it's not relevant, but if we do prove
21 infringement, there's a nexus by definition, and that goes to
22 nonobviousness because --

23 THE COURT: No, because then you get into all this
24 whole issue about what part of it -- this is a multicomponent
25 operation, and you've got to show what component, what part of

1 it contributed. Do you have somebody that does that?

2 MR. STRAPP: Yes. What we've done is -- this goes
3 back to some of the damages issues that we had raised in
4 previous hearings with Your Honor. What we did is we asked
5 Lawson to provide us with revenue information that was limited
6 to the products that we had accused of infringing, and that
7 royalty-based information was the subject of several motions
8 and was also the subject of much correspondence, but eventually
9 we received revenue spreadsheets that were generated from
10 Lawson's own data and that were generated by Lawson, and it's
11 that revenue that's limited to the products that are accused by
12 ePlus of infringement that we would like to show for two
13 reasons.

14 One, the commercial success of the infringer, which
15 we've already discussed, but we believe that it's also relevant
16 to willfulness, and the reason why is that under *Read v.*
17 *Portec* -- that's the 1992 federal circuit case we mentioned
18 earlier -- one of the factors that can be considered under a
19 willfulness analysis is the defendant's size and financial
20 conditions, and financial condition and -- the size and
21 financial condition is reflected by approximately \$600 million
22 that Lawson has made in sales just of the accused products.

23 THE COURT: What does the defendant's size and
24 financial condition have to do with willfulness? What does
25 that prove? Can you help me with that?

1 MR. STRAPP: Yeah. Well, first of all, if the
2 defendant is of a certain size or certain condition, they are
3 competing with ePlus, shows they are aware of ePlus, they are
4 taking sales from ePlus. If they were a small player in the
5 marketplace, ePlus wouldn't be able to look to Lawson and say
6 Lawson is taking sales away from ePlus, but ePlus and Lawson
7 are competing in the same mid market Fortune 1000 type
8 companies. They're going head-to-head against customers.

9 THE COURT: Does anybody say that?

10 MR. STRAPP: Well, yeah. The *Read v. Portec* case --

11 THE COURT: No. You can't just take a factor and
12 draw it out of a case and then say it applies in your case.
13 You have to have some witness make it applicable or some proof
14 to make it applicable. So who says that in your case?

15 MR. STRAPP: We intend to put on the president of
16 ePlus, the systems and content -- that's Mr. Farber -- who will
17 talk about the fact that these companies are competing in the
18 same type of marketplace for the same types of customers, that
19 Lawson has been -- then we will put on evidence through one of
20 Lawson's witnesses who we intend to call adversely. That's
21 Kenneth White. He's in charge of the revenue recognition at
22 Lawson, sort of an accountant/controller type of position, and
23 he was the person at Lawson who was in charge of compiling the
24 data that's reflected in these spreadsheets from data that's
25 regularly maintained in the ordinary course of business at

1 Lawson. What we've done --

2 THE COURT: You haven't yet answered my question
3 about who is going to testify about that factor. All you did
4 was said your man is going to testify about competition, and
5 then you described what this guy did, White did. What is it --

6 MR. STRAPP: We will put on Lawson's witness
7 adversely to testify about the commercial success that Lawson
8 has enjoyed from its sales of the infringing -- the accused
9 infringing products. And we will also --

10 THE COURT: That's not my question.

11 MR. STRAPP: Sorry.

12 THE COURT: You have cited a factor from the case.
13 If you will look at the case, you'll find, I believe, that
14 somebody in the case sponsored that as a factor. Who, in your
15 evidence, is going to sponsor this as a factor? It's not in
16 anybody's testimony, is it? Do you have any expert that's
17 going to testify about it? You haven't said Mr. Farber is
18 going to testify about it, and you haven't said Mr. White is.

19 What you said is they're going to testify to the
20 underlying fact of the size. You have to realize something.
21 Just because somebody says something in the case doesn't get it
22 into evidence because you, as lawyers, can make a logical
23 deduction that it ought to go there. You have to have a
24 witness or something to put it in the case.

25 MR. STRAPP: Our intention is to put the underlying

1 facts relevant to this factor as it goes to willfulness and
2 also relevant as it goes to commercial success in through fact
3 witnesses, including Lawson's witnesses and ePlus's witnesses,
4 and then once that -- once those facts are in evidence, to
5 argue to the jury that it shows nonobviousness.

6 It's a secondary consideration of nonobviousness to
7 show that's a factor that goes to the issue of willfulness.
8 That's the intention.

9 Now, one other point I wanted to make to Your Honor
10 is that with respect to what we have done, several -- as
11 Lawson's counsel noted, several of these spreadsheets are
12 voluminous. These are the spreadsheets as we got them from
13 Lawson, and spreadsheets are unwieldy and difficult to present
14 to the jury because they have several fields of data, they are
15 very wide documents, they're hard to decipher.

16 What we have done is simple math. We put together a
17 summary calculation that just takes the numbers from the
18 spreadsheet --

19 THE COURT: Who did that?

20 MR. STRAPP: Dr. Mangum did that. Now, the summary
21 isn't his opinion about what the royalty rate is, doesn't have
22 anything to do with the *Georgia-Pacific* analysis, it doesn't
23 have anything to do with his expertise as a damages expert.

24 It's, rather, a simple principle of basic math, of
25 addition, of taking numbers, putting them from one spreadsheet

1 into a chart that is of manageable size and can be presented to
2 the jury.

3 THE COURT: What do they show?

4 MR. STRAPP: They show that Lawson has enjoyed, in
5 the relevant time period for which we assert damages, from the
6 relevant time period, from 2003 through 2010, that Lawson has
7 made approximately \$600 million in total revenue selling the
8 accused infringing products.

9 Of that, there's three components. One is license
10 revenue, one is maintenance revenue, and one is service
11 revenue. These spreadsheets reflect that underlying raw data
12 that's now been summarized in short charts.

13 THE COURT: So he's going to testify as to what the
14 revenue is.

15 MR. STRAPP: That's correct. That's all we intend to
16 put on. We don't intend to put on evidence of royal rates or
17 *Georgia-Pacific* factors here through these witnesses. We just
18 intend to put on evidence of a chart saying this is the amount
19 of money you've made over this time period selling these
20 products.

21 THE COURT: All right. I think I understand.

22 MS. STOLL-DeBELL: There's a lot there to respond to,
23 Your Honor.

24 THE COURT: First thing is he says in his answer to
25 number six and in the answer to number eight he incorporates

1 six, and so you were on notice that they were going to claim
2 the revenues from your success as evidence of commercial
3 success.

4 MS. STOLL-DeBELL: So let's look at page 13 of their
5 interrogatory response, Your Honor. That was one of the two
6 places he cited. This paragraph is not about commercial
7 success. It is about Lawson recognizing the benefits of the
8 invention which is a totally separate secondary consideration.

9 There is a document relating to M3 where it says
10 something good about e-procurement software. That does not
11 have anything to do with commercial success or Lawson sales.
12 So that does not disclose to us they're going to use our,
13 frankly, voluminous sales figures to show -- somehow try and
14 show commercial success.

15 The other place he cited is on page 15, and he talks
16 about --

17 THE COURT: Just a minute. Let me get there. That's
18 the "moreover" paragraph.

19 MS. STOLL-DeBELL: Yes.

20 THE COURT: "Moreover, the patented inventions have
21 been commercially successful. The commercial success of the
22 patented inventions may be demonstrated by the commercial
23 success of the patentee's products as well as through the
24 commercial success of the infringer's infringing activity and
25 licensee's activities."

1 MS. STOLL-DeBELL: And then he goes on to talk about
2 SAP and I think Ariba also. So when he says infringer, they're
3 talking about Ariba and SAP which are listed in response to
4 interrogatory number eight. That says nothing about Lawson,
5 Your Honor. We were not put on notice that they were going to
6 now try and say that our sales show commercial success. You'll
7 see he talks about Ariba and SAP in response to interrogatory
8 number eight.

9 THE COURT: All right.

10 MS. STOLL-DeBELL: At like page 20.

11 THE COURT: Anything else?

12 MS. STOLL-DeBELL: Yes. If we're going to start
13 looking at our sales and say that shows commercial success of
14 their patent, then I think we need to bring in our old products
15 and show that they sold just as well, the old products that
16 don't infringe sold just as well --

17 THE COURT: That's another issue for another day.
18 Let's get to the objections here, or are you saying it's a 403
19 analysis, too?

20 MS. STOLL-DeBELL: I am saying it's a 403. I think
21 it wasn't disclosed to us. Had it been, we would have brought
22 in all of that evidence, but we didn't know they were going to
23 say that, so we haven't done it. So it is a 403 issue.

24 THE COURT: All right.

25 MS. STOLL-DeBELL: Another 403 issue is the fact that

1 they want to throw up the sales spreadsheet that says we sold
2 \$600 million worth of product. I think it's very prejudicial
3 to put that in front of the jury and unnecessary, and I would
4 note also that their \$600 million figure includes sales for
5 Lawson System Foundation and ProcessFlow which is a whole other
6 issue that is still open. That 600 million is not for the,
7 just for the accused products.

8 THE COURT: Anything else?

9 MR. STRAPP: Yes. Just first as to the disclosure
10 point, I think I mentioned that in the answer to interrogatory
11 number eight, the second supplemental answer, we incorporated
12 by reference a copy of the rebuttal expert report on validity.
13 That was served on June 9th, 2010, and that report specifically
14 makes mention of Lawson's sales of the infringing --

15 THE COURT: Let me see what part of it you are
16 talking about.

17 MR. STRAPP: I don't have a copy here.

18 THE COURT: I can't make a decision on that unless
19 you tell me what it is. My experience with those reports was
20 that there's a lot of verbiage in there, and it depends on what
21 the context is. You are relying on it. What did you say?
22 What did you say in that report?

23 MR. STRAPP: We said that we intended to rely on
24 Lawson's commercial success selling the accused products as
25 evidence of nonobviousness.

1 MS. STOLL-DeBELL: Your Honor, I don't think it
2 matters what it says because it wasn't in their interrogatory
3 responses, and so even if it was in their expert report, it's
4 too late. That was the rule that was applied to Dr. Shamos,
5 and many things that were said in his expert report were
6 excluded from this case because they were not in our second
7 supplemental interrogatory contentions. So I think the same
8 rule should apply for Mr. Hilliard.

9 THE COURT: When were these answers filed?

10 MS. STOLL-DeBELL: The supplemental --

11 THE COURT: 18 May. Anything else? Okay. Objection
12 sustained. Those statements in interrogatory six do not
13 forecast a reliance on the commercial success of Lawson, and
14 they clearly actually key into Ariba and SAP, and when you read
15 the answer to interrogatory eight, you quite clearly pick that
16 up, and to the extent they incorporate an after-filed report,
17 it's too late. The same rule applies to Hilliard as applies to
18 Shamos. So all objections are sustained.

19 We will resume in just a moment. We're going to take
20 a recess and change court reporters.

21

22 (Recess taken.)

23

24 THE COURT: Somebody had asked about what we were
25 going to do. I'm going to try to knock off a little bit after